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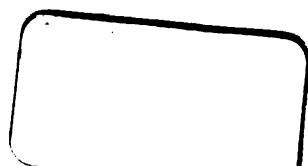
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Scotland. Court of Session.

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REPORTS OF CASES

DECIDED IN THE

COURT OF SESSION, TEIND COURT,
COURT OF EXCHEQUER, COURT OF JUSTICIARY,

AND IN

THE HOUSE OF LORDS,

FROM 12TH NOVEMBER 1852 TO 20TH JULY 1853.

BY

W. H. THOMSON, JAMES SMITH MILNE, JAMES MITFORD MORISON, AND
J. BOYD KINNEAR, ESQUIRES, ADVOCATES.

ROBERT STUART, ESQUIRE, ADVOCATE, EDITOR.

"JUDICIA ENIM ANCHORÆ LEGUM SUNT."—*Bacon. Aphor.*

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CASES DECIDED

IN THE

COURT OF SESSION, &c.

~~~~~  
WINTER SESSION, 1852.  
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NEW JUDGE.

Nov. 12. 1852.

This day the two Divisions of the Inner House resumed their sittings, when JOHN MARSHALL, Esquire, Dean of Faculty, presented the Queen's letter, nominating him a Lord of Session in room of LORD MEDWYN resigned. He was remitted to his trials as Lord Probationer.

DENISON and Co. v. BELL and BARCLAY.

No. 1.

Act 13 and 14 Vict. c. 36—Process—Issues.—It is premature for the Lord Ordinary to report to the Court upon issues under the statute, before disposing of an objection to the relevancy of the defences.

This was a report by the Lord Ordinary (Cowan) on proposed issues, pur-
porting to be in terms of the 13 and 14 Vict. c. 36. It appeared, however,
that an objection to the relevancy of the defences was yet undisposed of. The
proposed issue was admitted by the counsel for the parties to be merely "ten-
tative."

Denison and
Co. v. Bell, &c.

Moncreiff and Penney for pursuers.

Broun and the *Lord Advocate* for the defenders.

The LORD JUSTICE-CLERK observed that such was not the proper time for reporting on issues under the statute, as there would be no room for an issue at all should the objection be sustained, and the Court remitted to the Lord Ordinary to dispose of the question of relevancy.

Gibson-Craig, Dalziel, and Brodie, W.S., Agents for Pursuers.

Wm. Lorimer, S.S.C., Agent for Defenders.

(W. H. T.)

BURDIS and OTHERS v. WINGATE.

No. 2.

This was substantially the same as the last case, and was similarly disposed
of. (W. H. T.)

Burdis and
Others v. Win-
gate.

DICKSON v. PORTEOUS.

No. 3.

Landlord and Tenant—Right of Retention—Liquid and Illiquid.—Circumstances in which,
—Held that a tenant had no right to retain rents past due, in security of the price of way-
going crop, dung, and fallow.

This was an advocacy from the Sheriff of Peebles. Mr Dickson of
Hartree, pursuer and advocator, is proprietor of a farm which was let by
his author to the defender on a lease which expired at Whitsunday 1849, as
to houses and grass, and at the separation of crop 1849 as to arable lands.

Nov. 12. 1852.
Dickson v.
Porteous.

No. 1. VOL. II.

▲

Nov. 12. 1852. By the conditions of the lease the defender was to be paid, on its expiry, for the working of fallow, for dung, and waygoing crop at a valuation.

Dickson v.
Porteous.

At the above-mentioned terms the defender ceded possession to the new tenant, who agreed to pay him the value of the fallow, dung, and waygoing crop, while the defender was to pay to him any damages which might be found due for repairs of houses, drains, fences, &c. Their mutual claims were submitted to arbiters. The defender left the farm indebted to the pursuer in a year's rent, one-half due at Whitsunday, and the other at Martinmas 1849, and for payment of these the present action was raised in the Sheriff-court of Peebles-shire. The defender resisted payment, on the plea that he had a right to retain the rent in security of the sum which might be found due to him by the incoming tenant. The amount of the rent due was consigned along with the defences.

Shortly after the first of the terms at which rent was due, the pursuer had given the defender a special guarantee for the value of the waygoing crop.

The Sheriff sustained the defender's claim of retention, and the pursuer advocated.

Shortly after, the incoming tenant paid the value of the crop, but the arbiters had not yet given any award in regard to the other claims, and the question was now limited to the tenant's right of retention of the rent, for the price of the fallow and dung, until ascertained and paid.

The Lord Ordinary pronounced an interlocutor with a variety of findings, of which the only one, which substantially came to be discussed before the Court, was to the effect,—“That the submission entered into between the outgoing and incoming tenant, did not imply an abandonment by the former of his claim against the landlord for the value of the fallow and dung, assuming the same not to be otherwise satisfied.”

The pursuer reclaimed.

T. Mackenzie and the *Lord Advocate* for the reclaimers. The pursuer is entitled to immediate payment of his rent. The rent is a liquid claim, one-half of which had become due, and was exigible the moment the term of Whitsunday arrived, and the other half at the succeeding Martinmas. The counter claim on the part of the defender was contingent, doubtful in amount, and future, its amount being, even now, three years after the rent was due, not exactly ascertained, from delay in an arbitration to which the pursuer was not a party. These two claims could not be put in competition, a liquid and an illiquid, so as to found any right of retention on the part of the defender.

G. G. Bell and *Solicitor-General* for defender, respondent. The defender's claim must be looked upon as the price of certain articles delivered by him to the landlord, (or to the new tenant, for whom the landlord was bound), on leaving the farm, and must therefore be held as having become liquid simultaneously with the claim of rent. The delay in ascertaining the amount was accidental, and the landlord must be held as truly a party to the valuation.

The LORD JUSTICE-CLERK observed that he considered this as a case of special circumstances, and that he was unwilling to lay down an absolutely inflexible rule, that no right of retention could ever arise to a tenant for an illiquid claim, even if it should be a claim of damages arising from the con-

duct of the landlord during the lease. If, in the present case, the incoming tenant had refused to take steps to value the crop, and the landlord declined to take any charge of it, so that it was going to ruin, an equitable claim of retention might arise to the outgoing tenant for his protection. Here, however, there were no circumstances to warrant any such claim. There was no allegation of the insolvency of the new tenant, or of unwillingness or inability on the part of the landlord. On the contrary, the landlord had, after the first term's rent was due, and before the tenant's counter claims had emerged, actually given a special guarantee for the value of the crop. Nov. 12. 1852.
Dickson v. Porteous.

The other Judges concurred, and the Court altered the interlocutor, found "that at the date of raising the action, none of the claims preferred by the tenant, could in the circumstances be competently pleaded, or can now be competently pleaded in defence against the landlord's claim for rent past due," repelled the defences, and granted warrant to pay the consigned money to the pursuer.

Gibson and Hector, W.S., Agents for the Pursuer.

James Robertson, W.S., Agents for the Defender. (W. H. T.)

DEAN OF FACULTY.

Nov. 13. 1852.

This day the Lord Advocate (Ingليس), was elected Dean of Faculty in room of John Marshall, Esq., (Lord Curriehill) promoted to the Bench.

LORD CURRIEHILL.

This day, JOHN MARSHALL, Esquire, having passed his trials as Lord Probationer, and having had the usual oaths administered to him, took his place on the bench by the title of LORD CURRIEHILL. Nov. 16. 1852.

CAMPBELL v. CAMPBELL.

No. 4.

Evidence—Amexation of Parishes.—In a question whether two parishes were united or separate and distinct—*Held* that although there was no direct evidence of their having been united, it might be competently proved by circumstantial evidence.

Observed that the circumstance of one minister having been appointed to the cure of two parishes for two centuries was conclusive evidence of their having been united by competent authority.

This was an action of declarator brought at the instance of the heritors of the parish of Kilberry against the heritors of the parish of Kilcalmonell, in the county of Argyll; and the object of the action was to have it found and declared, (1.) that Kilberry and Kilcalmonell are separate parishes, *quoad omnia*; and (2.) that the heritors and inhabitants of each are liable only for the maintenance of the poor of their respective parishes, and not jointly for the maintenance of the poor of the two parishes. The defence was, that the parishes were united at a very early period long prior to the date of any authentic record on the subject that can be produced, and that they have constituted one united parish ever since. 1st Division.
Nov. 16. 1852.
Campbell v. Campbell.

In support of their allegations that these districts are separate parishes, the facts and circumstances on which the pursuers founded as evidence may be stated generally as follows:—

1. That the lands are not physically attached to each other, and, therefore, the presumption is against their being one parish.

Nov. 16. 1852. 2. That there is no evidence, that being separate parishes, they were ever united.

Campbell v.
Campbell.

3. That a valuation of teinds by the Presbytery of Argyll, dated 5th June 1629, refers to these districts as separate parishes.

4. That there were at one time separate patrons of each district; and that although the patronage of the united parishes now belongs to the family of Argyll, it was so vested in them by deed of resignation of the teinds and patronage of Kilcalmonell, dated 16th March 1635, in favour of Lord Lorne, the patron of Kilberry.

5. That in an assignation of the teinds of the parish of Kilberry by the Bishop of Argyll to the Earl of Argyll in 1671, that parish is not described as united to any other parish.

6. That in a retour of the Earl of Argyll in 1695, the parishes are mentioned as being separate and unconnected.

7. That in the title-deeds of the lands locally situated in Kilberry and Kilcalmonell respectively, the lands are generally described as lying in the one parish or in the other, according to their actual locality.

8. That prior to 1820, the only church was in Kilcalmonell, maintained by the heritors of that parish, and that no seats in that church were ever allocated to the heritors of Kilberry; and that in 1820 a church was built in Kilberry at the expense of the heritors of that parish, and that no seats in it were allocated to the heritors of Kilcalmonell.

9. That certain legal proceedings with the schoolmaster, who had been appointed in 1806 under the Schoolmasters' Act, took place with the heritors of Kilberry alone, the heritors of Kilcalmonell not having been called, nor having appeared in the proceedings.

10. That in the "Regist. de Passelet, p. 123," referred to in the *Origines Parochiales*, edited by Mr Cosmo Innes, these parishes are described as separate and distinct.

The defenders founded on the following facts and circumstances:—

1. There is no evidence of Kilberry and Kilcalmonell ever having been separate parishes; *esto*, they were separate parishes at one time, there is now sufficient evidence to shew that they are united.

2. That for time immemorial, and at least for 200 years, there has been only one minister who has conducted himself as minister of one parish.

3. In augmentations of the stipend of Kilcalmonell and Kilberry in 1635, 1764, and 1803, these parishes are referred to as united. (The decree of 1635 was not produced, but only a copy, the authenticity of which was, however, disputed.)

4. That the minister possesses only one glebe. Till 1826 he had no manse; but an allowance for manse rent was paid him by the heritors of both parishes. In that year a manse was built, the expense of which was borne in common by the proprietors of both districts, all according to the rule which would have held in one undivided parish.

5. In the valuation rolls of the county of Argyll, the lands in Kilcalmonell and Kilberry, as set down as in one united parish; as also in a notice of the parishes, contributed by the then incumbent of the united parishes to the statistical account of Scotland, published in 1794.

6. In carrying out the provisions of the Schoolmasters' Act, the heritors of

both districts resolved to proceed as if they were only one parish, and to take the opinion of counsel as to whether the parishes were separate or united. That opinion has not been found; but the heritors subsequently elected two schoolmasters with 300 merks each, without any school or house accommodation, the *maximum* salary under the Act being assessed as in a single parish. Nov. 16. 1852.
Campbell v. Campbell.

7. The management of the poor has always been joint and common to the whole united parish. The church door collections, which formed the whole fund, were administered by one body, and applied indiscriminately to the poor of both districts.

8. Since the passing of the 8 and 9 Vict., c. 83, the whole proceedings have been conducted on the footing of these districts constituting one parish.

The Lord Ordinary (Dundrennan) sustained the defences, and assoilzied the defenders from the conclusions of the action, and found the pursuers liable in expenses. In a note appended to his interlocutor, his Lordship remarked, "it is quite true that in the case of *Irvine*, 24th June 1824, which related to the disjunction of lands from a parish, the Court held that this could not be proved by any usage, *per se*, however inveterate; and it may be admitted, generally speaking, that the same principle applies to a proof of a union of parishes; but it is to be observed, that in the case of *Irvine*, their Lordships agreed that it was not necessary either to produce the decree, or to instruct its terms by a process of proving the tenor. This seems clearly to imply that the want of this evidence may be supplied by equivalents, if otherwise sufficiently strong as evidence either of the disjunction or union of parishes. Accordingly, in the case of *Ross v. the Earl of Haddington*, 8th June 1824, the Court found upon circumstantial evidence, that the King's park formed part of the Canongate parish;" and upon evidence of the same description, his Lordship held that the pursuers had failed to prove their case.

Against this interlocutor, the pursuers reclaimed.

Macknight, E. S. Gordon, and the *Lord Advocate*, for the reclaimers.

T. Mackenzie, and the *Solicitor-General* for the respondents.

THE LORD PROBATIONER. The question here raised becomes very much a matter of fact to be determined by such evidence as exists, and the inference in law is to be drawn from the documents founded on in this action. It appears to me that there is no ground for doubting that these parishes were at one time separate. In the documents founded on by both parties, they are described as united, which implies that they had previously been separate. There were also two patrons, each of a separate district, and therefore if the case had rested on these matters, I could not have entertained any doubt as to the conclusion to be arrived at. But the important matter is this, whether assuming them to have been separate parishes at one time, there is not evidence to establish that they have since been united by competent authority. Now it appears to me that there is one fact in the case, which is of great, if not of conclusive authority, and it is this, that since 1629, at all events, there has been only one minister established in the cure of these two parishes. Now it is said, in order to take off the effect of this important fact, that it is a matter of history, that after the Reformation there was a great scarcity of ministers to supply the cures of parishes, and therefore that readers were ap-

Nov. 16. 1852. pointed to take charge of vacant parishes. There can be no doubt that it was so; and then it is said, that being the case in 1574, the presumption is that it had so continued down to 1629, and that thus an irregularity had crept in, and the distinction between the two parishes been gradually lost sight of. Now I expected to have heard allusion made to a very important Act of Parliament, that was passed between these two dates, and which appears to me to be of vital importance, viz., the Act 1581, which prevents pluralities in the Church of Scotland. It requires that there shall be a separate minister for every parish. For more than two centuries therefore the Presbytery of Argyll would thus have been guilty of systematically violating the ecclesiastical law of Scotland, by appointing the minister of Kilcalmonell, to a plurality of cures in these two parishes. But it is not possible to believe that during all that time, the minister of these districts has been indulged with the privilege of being a pluralist, contrary to the Act of Parliament, and the practice of the Church of Scotland. Therefore we are driven to this conclusion that these were united parishes.

Campbell v.
Campbell.

Now, it is said, that in point of law, assuming that the parishes were at one time separate, that nothing could unite them but an Act of Parliament or a decree of the Teind Court; and as we have no evidence of such a decree having been pronounced, the Court must assume that it never had been pronounced. I think that usage and documents of the kind founded on, alluding to these parishes as being united parishes of sufficient early date, and the proceedings of these parties having been regulated for such a length of time by this understanding, and, moreover, as the appointment of a minister to two parishes not united would have been unlawful at the time, these considerations render it quite competent for the Court to hold that there has been a union, by whatever authority that may have been made. Usage is sufficient to establish corporations, and it is applicable to cases of this kind also. It is a mistake to say that there never was any authority but the Teind Court or Parliament that could unite separate parishes. Before the Reformation it was competent for bishops to do so. And during the period between the Reformation and 1617, the practice was for the Queen and Council to erect parishes; Connel on Parishes, Vol. iii. p. 2. Thus it is quite possible that this union might have been effected by the Bishop of Argyll before the Reformation, or by the Queen and Council prior to 1617. It might also have been made by the Commission of 1617 itself; and, therefore, I think it is quite possible that there may have been a union of these parishes; and being possible, I think there are sufficient grounds for assuming that these parishes were so united. Therefore it appears to me that this case should be disposed of by the Court refusing this reclaiming note, and adhering to the Lord Ordinary's interlocutor.

THE LORD PRESIDENT. The view which I take of this case is in accordance with the opinion of the Lord Ordinary and the Lord Probationer. It is a question depending on evidence, and it is not necessary that the decree of the union should be produced. It is enough that there is sufficient evidence to satisfy us that there was such a union. I do not think that the case of whether a portion of lands belongs to such and such a parish or not depends

on the same kind of evidence as the present. We have here every thing but Nov. 16. 1852
the evidence of the decree itself to prove the union. It would be difficult for
parties sometimes to produce their decree; and not having it, I do not see Campbell v.
that they could have stronger evidence of the union than has been produced. Campbell.

LORD FULLERTON. I am entirely of the same opinion. In fact, it appears to me, that had it not been for the circumstance of these parishes being called the united parishes of so and so, there would have been no case at all. The fact that for two centuries there has been only one minister, forms an insuperable objection to the action.

LORDS CUNINGHAME and IVORY concurred.

The Court "recall the interlocutor of the Lord Ordinary in so far as it finds the pursuers liable in expenses to the defenders; Find no expenses due to either party, and decern. *Quoad ultra* refuse the prayer of the said reclaiming note, and adhere to the interlocutor of the Lord Ordinary reclaimed against."

James Macknight, W.S., Pursuers' Agent.

Tawse and Bonar, W.S., Defenders' Agents. (J. S. M.)

BUDGE v. BALFOUR.

No. 5.

Process—Expenses of Jury Trial—Auditing Accounts.—The Court will not anticipate the period fixed by the Act of Sederunt for taxing accounts, with regard to any particular item of these accounts.

Allowance to Witnesses.—A dealer in farm produce is not entitled to the allowance of a professional witness.

In an action of damages, at the instance of a tenant against his landlord, 1st Division.
a verdict was given in favour of the pursuer, who was also found entitled to expenses. Certain witnesses from Orkney having asked payment of the pur- Nov. 16. 1852.
suer's agent, whose accounts had not yet been taxed, he did not feel safe to pay them without the authority of the Court. The Act of Sederunt provides for Budge v.
a remit to the Auditor only upon the verdict being applied, which had not Balfour.
yet been done. In these circumstances

N. C. Campbell for the agent disburser now moved that his accounts as regards these witnesses be taxed, and that the opposite party be called for his interest.

Patton for the defender's agent objected to the competency of this proceeding, the period fixed by the act of Sederunt for taxing the agent's accounts as in a question with the opposite party not having arrived.

The LORD PRESIDENT. Is there any precedent for the Court interfering at this stage of the proceedings?

LORD FULLERTON. I think that the opposition is most ungracious. I do not see what interest the party has to object.

LORD IVORY. There being no precedent for this proceeding, I think that the motion cannot be sustained; at same time, the party acting in this unreasonable spirit must consider that the Court will have this in view, and if there be any doubt as to the amount paid, that must all go against himself.

LORD CUNINGHAME concurred.

Motion disallowed.

Nov. 16. 1852. In this case also the Court refused to grant an allowance to a dealer in farm produce as to a scientific or professional person in the meaning of the Act of Sederunt.

Rudge v.
Balfour.

Charles Spence, S.S.C., Pursuer's Agent.
Smith and Kinnear, W.S., Defender's Agents. (J. S. M.)

No. 6.

MUIRHEAD and ARTHUR v. M'EWAN.

Reference to Oath—Commission.—Circumstances in which a commission was granted to a person in Australia to take a reference to oath.

1st Division.

Nov. 16. 1852.
Muirhead and
Arthur v.
M'Ewan.

In this case a minute of reference to the oath of the pursuers was sustained in July last and commission granted. The defender proceeded to execute his commission by examining one of the pursuers who resided in Glasgow, when he became aware, as he alleged, for the first time, that the other pursuer was in Australia.

Pypar for the defender now moved for commission to a person in Australia to take the oath of the pursuer resident there.

Logan, for the pursuers, on the ground that it appeared to be the desire of the defender to create delay, moved that a commission should be granted only on the condition of the defender being ordained to make payment of the sum and expenses for which he had been found liable, the pursuer finding caution to repay in the event of the Court, on advising the oath for the pursuers, finding it affirmative of the reference.

The LORD PRESIDENT. The commission was granted in July last, without there being any such condition attached as it might have been competent for the pursuers then to have moved for.

The COURT, therefore, granted the commission, and refused the pursuers' motion.

Lockhart, Morton, Whitehead, and Greig, W.S., Pursuers' Agents.
Alexander Hamilton, W.S., Defender's Agent. (J. S. M.)

No. 7.

TAYLOR v. GLASGOW, PAISLEY, AND ARDROSSAN CANAL COMPANY.

Bill Chamber—Supplementary Note of Suspension—Lis alibi pendens—Minute of Abandonment.—A note of suspension and interdict was brought as supplementary to a previous note which had been passed, but to which the respondents had stated an objection, which it was intended by the supplementary note to remove. To this supplementary note an objection was taken of *lis alibi pendens*. The complainer lodged a minute offering to abandon the previous note and pay expenses, but on condition that the supplementary note should be passed in order to try the question between the parties:—*Held*, that such abandonment, although conditional, obviated the objection.

1st Division.

Nov. 16. 1852.

Taylor v.
Glasgow, Pais-
ley, and Ar-
drossan Canal
Company.

This was a note of suspension and interdict, to the competency of which an objection was now taken on the ground of *lis alibi pendens*.

An arrangement had been entered into, by certain parties in Paisley, with the Glasgow, Paisley and Ardrrossan Canal Company, by which they were allowed to form a tank in the neighbourhood of the Canal, to catch the surplus water flowing out of it, for the purpose of supplying their works with water.

Subsequent to the above agreement, the suspender, Taylor, acquired right to a share in the Canal Company, and presented a note of suspension and interdict to prevent the operations under the agreement being carried into effect, as being *ultra vires* of the Canal Company, and for other reasons. Answers were lodged by the Canal Company, in which they stated objections to the complainer's title. The Lord Ordinary on the Bills, (Fullerton), passed the note, but refused the interdict *in hoc statu*. Nov. 16. 1852.
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low and Ar-
drossan Canal
Company.

In these circumstances the complainer presented a supplementary note of suspension and interdict, with a view to obviate the objection to his title, and in order to its being conjoined with the original note of suspension and interdict depending before the Court. The Canal Company lodged answers, and pleaded that the action ought to be dismissed in respect of *lis pendens*. The Lord Ordinary, (Anderson), having heard parties, "allows the complainer to lodge a minute . . . abandoning the original process of interdict." The following minute was lodged:—"Deas for the complainer stated that on this note being passed and sustained as a separate and independent note of suspension and interdict, he was willing to pass from and withdraw the original note of suspension and interdict therein referred to, and to pay the respondent's expenses incurred in opposing that note, subject to taxation in usual form; and he accordingly agreed and became bound to do so by a note or minute to be lodged in that application so soon as the interlocutor passing and sustaining this present note of suspension and interdict should become final."

The Lord Ordinary, "in respect of the complainer's minute, passes the note and refuses the interdict."

The respondents reclaimed.

N. C. Campbell and *Penney* for the reclaimers. The only question is, whether this minute is an abandonment of the previous case. There must be an abandonment of the previous case before this case can go on. The abandonment in the minute is conditional, and, therefore, no abandonment at all; *Magistrates of Edinburgh*, 16th Dec. 1824, 3 S. and D. 403; *Crawford*, 2d June 1829, 7 S. and D. 692; *M'Neill*, 7th Feb. 1828; 6 S. and D. 497; *Shand*, p. 200-499; *M'Indoe*, 7th Dec. 1826, 5 S. 92; *Stewart*, 21st June 1836, 14 S. 989; *Wood*, 4th Dec. 1823, 2 S. 555; *Howie v. M'Gregor*, 1st Feb. 1828, 6 S. and D. 475.

Deas was for the respondent.

THE LORD PRESIDENT. I have some difficulty in point of form. If we sustain this supplementary suspension, while the other note is not abandoned, we are virtually repelling the plea of *lis alibi pendens*.

LORD FULLERTON. I am inclined to agree with the doubts raised by the Lord President as to form. If Taylor is to abandon the first note, he must abandon it out and out. He is not entitled to tack to it a condition.

LORD IVORY. I see the grounds on which the Lord President places his doubts, but I am inclined to agree with the Lord Ordinary. If this constitutes *lis alibi pendens*, it is because the merits of the two applications are the same. If that be so, and the only objection to the passing of the second note is that the first stands in the way, is it not a sufficient answer to say that the first shall be taken out of the way? Looking to the first application, I see

Nov. 16. 1852. that it was passed on the merits. Then comes this second suspension. This is to cure the objection to title in the first. The title, therefore, is the only thing that is between the parties, because we must hold that the merits are identical. In this question of title, therefore, is it not enough for the suspender to say, I shall take the first note out of the way, if you will put me in the same position as I was before as to the merits?

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ley and Ar-
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Now, as to this matter of *lis alibi pendens* in the Bill-Chamber, I have some difficulty how far it can avail. Suppose the first note had been refused. The second could not have been refused on the ground of *res judicata*, and, if so, is the first *lis alibi pendens* to the extent of excluding the second while it stands? But not feeling that I should be disposed, if that matter was before the Court, to sustain a plea of *res judicata*, how can I hold that in a question where the title alone is concerned, there is *lis alibi pendens*? Then, if the title be different, where is the *lis pendens* where I bring a new suspension? If there be any difficulty as to the word supplementary, let it be struck out, and let this one stand on its merits; but if the party will stand on the bare objection of *lis pendens*, not going into the question of the merits, it is straining the matter too far not to allow the suspension to pass, the first being abandoned.

LORD CUNINGHAME. Looking to the minute of abandonment, I consider nothing could be expressed in more explicit terms than it is. The party is bound by it, and it is satisfactory and complete.

The LORD PRESIDENT. Having heard the opinion which has fallen from Lord Ivory, I am not disposed to press my doubts. I should have thought it a less difficult case if there had been no minute at all.

The COURT, therefore, "refuse the prayer of the reclaiming note, and adhere to the interlocutor of the Lord Ordinary reclaimed against."

Alexander Nairne, S.S.C., Reclaimers' Agent.

John Martin, W.S., Suspender's Agent.

(J. S. M.)

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THE COURT.

This day LORD WOOD took his place on the bench of the Second Division of the Court in room of LORD MEDWYN resigned.

HENDERSON v. JAFFRAY.

No. 8.

Act 18 and 14 Vict. c. 36, sec. 11.—Process—Interlocutor—Reclaiming Note.—A reclaiming note against a finding of expenses, (the judgment on the merits, contained in the same interlocutor, being acquiesced in), does not require to be lodged within the ten days.

1st Division.

Nov. 16. 1852.

Henderson v.
Jaffray.

The Lord Ordinary had pronounced an interlocutor, which disposed both of the merits and the expenses, only the latter finding was reclaimed against.

The respondent objected to the competency of the reclaiming note, on the ground it was not against an interlocutor disposing of the merits of the cause, and ought to have been presented within ten days, under the 11th section of the Court of Session Act.

The Court held that the interlocutor was one and indivisible, in regard to the number of reclaiming days. The object of the enactment was to prevent

undue delay in reclaiming upon incidental points, *before* the merits were disposed of. Here the judgment on the merits being acquiesced in, the expenses were the only remaining point. Objections repelled.

Gifford, for reclaimer; *Logan*, for respondent.

Party Pursuer, Agent.

R. Arthur, Agent for Defender.

(W. H. T.)

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Henderson v.
Jaffray.

STEWART and OTHERS, (Trustees of the deceased James Robertson), v.
JOHN ROBERTSON, Senior, and JOHN ROBERTSON, Junior.

No. 9.

Oath of reference—Intrinsic and extrinsic.—Deposition in a defender's oath of reference held extrinsic, and the oath held to be negative, though it involved a statement, that the debt in question had been settled.

This was an action for payment of the contents of a promissory note granted by the elder of the two defenders, to the deceased James Robertson, his brother, for a loan of L.200. The portion of the case in which the younger defender was concerned, need not be noticed.

In defence, it was stated, *inter alia*, that the debt had been long ago settled.

The pursuers referred to the oath of the defenders.

In taking the deposition of John Robertson senior, after the deponent had admitted the constitution of the debt against him, and after some questions in regard to the payment of interest, the following question was put,—“Whether the principal, or L.200, the sum in the said note, was paid by you to your said brother, and how and when?” *Answered*—“That the note was settled in 1847: That it was settled in this mode; my brother had a property in Coupar-Angus, which I purchased from him at L.600, and he gave me a mandate to sell it to the Midland Railway, for which it was required: That the price to be paid by the Railway Company was finally fixed at L.900, out of which by expenses was reduced to L.870, some odd shillings: That when the money was paid, my brother got his L.600, and L.200 for the promissory-note libelled, and the balance my brother retained, saying it was all one, seeing my family would get what money was left by him: That the whole sum of L.870 was paid to my brother,” &c. &c. Further interrogated, depones—“I did not get up the promissory-note from my brother, because the transaction was settled in the office of Mr A. Robertson, Blairgowrie, and my brother was then residing at the Tower of Lethendy; and I never troubled myself about the matter, nor asked my brother about the bill at any time.”

The Lord Ordinary found “That the facts and circumstances deponed to by John Robertson senior, in regard to the payment of the debt, are extrinsic of the subject matter of the reference: That the depositions are affirmative of the reference as regards the defender, John Robertson senior;” and decerned against him in terms of the libel.

The defender, John Robertson senior, reclaimed.

Patton and Deas for reclaimer. The statements in the oath that “the note was settled in 1847,” and “my brother got (his L.600 and) L.200 for the promissory-note libelled,” are intrinsic and negative of the reference. The complicated statement of the mode of payment might no doubt be held extrinsic, but it was simply superfluous, having been forced from the deponent

2d Division.
Nov. 16. 1852.
Stewart and
Others v.
Robertson, &c.

Nov. 16. 1852. by the questions put, and could not affect the substantial result, which was, that the debt was no longer resting owing.

Stewart and Others v. Robertson, &c. *Solicitor-General* for respondent. The pursuer argued that the statement of the extinction of the debt, not in the natural and direct way, but by a separate transaction involving a sale of heritage, which could be proved *aliunde*, could not be received as intrinsic and negative; and referred to Ersk. IV. ii. 11.

The LORD JUSTICE-CLERK and LORD MURRAY held the statements to be extrinsic of the reference. They referred to a separate transaction, of which the pursuer had no previous warning, and which might have formed the subject of a separate oath in a separate action, besides admitting of being proved by other means. If they were allowed to prevail, there could be no limit drawn, and no safety in making a reference to oath.

LORD COCKBURN differed. The natural way to pay a bill for L.200 was to take L.200 and give it to the creditor. The defender here said in his oath that he had done so. They then press him as to how he came to have L.200—"how and when?" The pursuer could not make the deposition extrinsic by forcing the defender to give a long story.

The COURT adhered.

George Munro, S.S.C., Pursuers' Agent.

Isaac Anderson, S.S.C., Defenders' Agent.

(W. H. T.)

No. 10. T. G. MURRAY CURATOR BONIS for JOHN FERRIER, W.S., *Petitioner*.

Lunatic, English Committee of—Curator Bonis—Scotch heritable estate.—Circumstances in which the Court authorised the proceeds of an heritable estate in this country belonging to a lunatic resident in England, and who had no *curator bonis* to take charge of his estate in Scotland, to be paid over to the committee appointed under an English commission of lunacy.

2d Division.

Nov. 16. 1852.

Murray,
Petitioner.

The petition in this case set forth that Mr Ferrier had been appointed in 1824 *curator bonis* on the heritable estate of William Conway Campbell, only son of the deceased Lord William Campbell. That this heritable estate merely consists of certain superiorities in Argyllshire, the general estate of William Conway Campbell being in England and the Colonies, and then under the management of the Duke of Argyll and Lord John Campbell under an English commission of lunacy. That Mr Ferrier entered upon the management of these superiorities, granted entries to vassals, and continued to discharge the duties of his office until he himself became incapable to manage his own affairs, and in consequence, the petitioner was on 18th July 1851, appointed *curator bonis* upon the estate. That on Mr Ferrier's accounts, which had been reported upon and approved of, there remained a balance, exclusive of commission, of L.369 : 16 : 6, in favour of the estate, which had been consigned in the Royal Bank of Scotland under direction of the Accountant of Court.

The petition proceeded to state that William Conway Campbell remained a lunatic, and is resident in England, and that the Duke of Argyll and Lord John Campbell having both deceased, a commission of lunacy and appointment had now been made in favour of certain other parties, and that no separate *curator bonis* had been appointed for the management of the said William Conway Campbell's heritable estate in Scotland.

The petition therefore prayed that the accounts of the management might be remitted to the accountant and approved of, "and thereafter on receiving such report to approve of the accounts, and of the management, and to authorise the petitioner to pay over the balance which shall be due thereon, to the parties acting under the before mentioned commission of lunacy, and to exoner the said John Ferrier and his estate of his said act of curatory; and to grant warrant to, and ordain the Clerks of Session or custodiers thereof, to deliver up the said John Ferrier's bond of caution."

LORD JUSTICE-CLERK. This is an unusual proceeding, but in the circumstances, and as the sum is not large, I think we may allow what is here asked.

The other Judges concurred, and the Court pronounced an interlocutor, by which they authorised the money to be paid to the commissioners aforesaid, under deduction of the expense of this application for exoneration and proceedings connected therewith, and on production of a discharge by the commissioners in favour of Mr Ferrier and his *curator bonis*, their Lordships exoner Mr Ferrier and his estate of the act of curatory in his favour, and grant warrant to, and ordained the custodier of the bond of caution to deliver up the same to Mr T. G. Murray, and decerned.

T. G. Murray, W.S., Agent.

(R. S.)

DICK v. BORROWS.

No. 11.

Bankruptcy—Divesting of Bankrupt—Diligence.—A. was sequestrated and a trustee appointed, who proceeded to realise and sell the estate, which was purchased by B. B. conveyed the whole in favour of the bankrupt's wife, excluding the husband's *jus mariti* and right of administration. Afterwards C., a creditor who had obtained a decree in absence against the bankrupt prior to the sequestration, proceeded to recover by a poinding, and carried off certain effects; whereupon B.'s disponent applied to the Sheriff to have the effects restored, and having obtained decree, charged C. accordingly:—*Held* in a suspension of that charge, that the bankrupt had been completely divested by the sequestration, that the diligence was therefore irregular, and that the poinded effects must be restored.

This was a suspension of a charge on an extract interim-decree of the Sheriff of Lanarkshire, by which Dick was charged to restore to the respondent, Mrs Marian Angus or Borrows, wife of Jeremiah Borrows, baker in Glasgow, certain effects, which she alleged the suspender had wrongously poinded.

The material facts were these:—On the 24th February 1848, the estate of Jeremiah Borrows was sequestrated under the Bankrupt Act, 2 and 3 Vict., c. 41, by the Lord Ordinary on the Bills, and William M'Lean, accountant in Glasgow, elected and confirmed interim factor and trustee. M'Lean proceeded to realise the estate, and convert the same into cash for behoof of Borrows' creditors, and he accordingly inventoried and valued the bankrupt's household and bake-house furniture, and thereafter offered the same for sale. Whereupon Arthur Connor, surgeon in Glasgow, the brother-in-law of the respondent, Mrs Borrows, purchased the said furniture from M'Lean, the trustee, paid the price to him, and thereafter took possession of the same. Connor then conveyed the furniture to Mrs Borrows, excluding her husband's

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Nov. 16. 1852. *jus mariti* and right of administration, and declaring that it should not be attachable for her husband's debts or deeds, but should be her own exclusive property, and under her own control, conform to assignation executed by Connor, dated the 29th day of April 1850.

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Borrows.

It appeared that in January 1848, and prior to the sequestration of Jeremiah Borrows, Dick obtained decree in absence before the Sheriff against him for various sums, amounting to L.84, 12s. or thereby, which decree, however, it was averred, had been opened up. The record for the suspender, Dick, then sets forth, *inter alia*, the following averment:—"Mr Borrows was unable to carry a settlement by composition with his creditors, at least he pretended to be so, and continued to carry on business, both as a coal master and baker as before, retaining his whole household, shop, and bake-house furniture and utensils, (an inventory and valuation of which had been taken by the interim-factor), and for which, deducting the rent of his premises and other preferable debts, he settled with Mr M'Lean, the trustee, either directly or indirectly." The poiding took place in June 1850, and the poided effects were shortly thereafter removed from Borrows' premises.

In these circumstances it was pleaded for Dick, that the furniture and effects in question were liable, on the ground of possession and reputed ownership, to be attached or poided by him on his decree, as the property of his debtor Borrows; and that the conveyance by Connor to Mrs Borrows was simulate and illegal, and could not be set up against his diligence.

For Mrs Borrows it was contended,—That her husband having been divested of the furniture and effects by the sequestration, and the trustee having sold them to Mr Connor, and Connor having taken possession and transferred them to the respondent, exclusive of her husband's *jus mariti*, they were not subject to Dick's diligence.

The Lord Ordinary (Rutherford) pronounced the following interlocutor:—"Repels the reasons of suspension; finds the letters and charge orderly proceeded, and decerns; finds the chargers entitled to expenses in this Court; appoints an account thereof to be given in; and remits to the Auditor to tax and report; reserving to the parties to proceed in the Court below."

Dick reclaimed.

Pattison and *Moncreiff*, for reclaimer, contended that the facts did not prevent his proceeding with his diligence, and that the effects in question had been properly poided.

Deas, with whom *Cook*, for the respondent, argued,—That the facts admitted on the record by Dick put him out of Court. Here was an attempt to proceed by private diligence, irrespective of the sequestration, and at the same time to claim the benefit of the latter. Counsel read the averments from the record before mentioned, and contended that it destroyed the suspender's whole case.

The Court were of this opinion. The suspender, by his averments and pleas, had deprived himself of all right to proceed, as he had here attempted to do. The passage from the record to which the attention of the Court had been directed, annihilated the suspender's whole case. From his own statements it clearly appeared, that Borrows the bankrupt had been completely

divested, and that the furniture and effects had been validly conveyed to Mrs Nov. 16. 1852.
Borrows. Their Lordships, therefore, adhered to the interlocutor of the
Lord Ordinary, and found the chargers entitled to additional expenses.

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James Bell, S.S.C., Agent for Dick.

Thomas Sprot, W.S., Agent for Mrs Borrows.

(R. S.)

A v. B.

No. 12.

Caution, Bond of—Erasure—Vitiation.—Where the words “us” and “our,” in the obligatory clause, in the attestation on the back of a bond of caution, were written on an erasure, the Court refused to hold that there was a material vitiation, and sustained the bond.

This was a suspension of a charge at the instance of one of the attestors to 2d Division. a bond of caution, on the ground that the attestation, written on the back of the bond of caution therein mentioned, was erased and vitiated in *essentialibus*. Nov. 16. 1852.
The attestation bore as follows :—“ We A. B. and C. D. do hereby not only certify and attest the sufficiency of the within-designed E. F. as cautioner, in manner within expressed, but also bind and oblige us, our heirs, executors and successors as cautioners and surety *subsidiarie* along with him for the within-designed complainer, in manner within specified.” A. v. B.
Then followed a clause of registration of the attestation, along with the bond, in terms of the clause of registration therein contained, and a testing clause. The words “us” and “our” in the above clause appeared to have been written on an erasure; the words appeared to have been originally “me” and “my,” and the writer, by erasing and altering the form of the letters, had contrived to convert the “me” and “my” into “us” and “our.” There was no declaration referring to the alleged erasure in the testing clause.

The complainer therefore pleaded that there was a fatal vitiation, and that the charge and whole grounds and warrants thereof ought to be suspended.

The respondent’s plea was, that there was no vitiation in *essentialibus* of the attestation, and that the statutes relating to the solemnities of deeds did not apply.

The Lord Ordinary (Fullerton) refused the note, and found the complainer liable in expenses. His Lordship observed in the note to his interlocutor, that on looking at the attestation he could not satisfy himself that there was any erasure.

The suspender reclaimed.

Deas for the reclamer. There is here plainly a vitiation, a serious alteration, and this has the same effect as an erasure. Could not other words have been written there which would have altered the import of the document? The Court have been very strict in such cases of late, and to sustain this attestation would be going very far. This is not the case of an ordinary action at all, but a charge on a bill, a question of summary diligence. For the foundation of diligence a document must be faultless. See cases of *M’Rostie*, 2d March 1850; *Hamilton*, 1st December 1824; *Forbes*, 4th March 1847; *Brown*, 9th February 1849; *Burleigh*, 20th July 1848.

Macfarlane, for the respondent, was not called on.

LORD JUSTICE-CLERK. I am not satisfied that there is any vitiation here;

Nov. 16. 1852. but assuming that there is a vitiation, there is a plain distinction between the cases referred to by Mr Deas and the present. These cases relate to judicial writs to be used by the parties obtaining them. This is the case of a bond of caution, and in a different situation altogether.

A. v. B.

LORD COCKBURN. I am of the same opinion. I am not satisfied that there is any erasure or vitiation here at all. The "us" and "our" are just not well written.

The COURT adhered; found the reclaimer liable in additional expenses, and remitted to the Lord Ordinary on the Bills to decern for the same as taxed.

(R. S.)

No. 13.

FERGUSON v. FERGUSON and OTHERS.

11 and 12 Vict., c. 36—*Entail Amendment Act*—*prohibitory clause*—*order of succession*—*irritancy*.—Where the prohibitory clause in an entail is not duly fenced as respects the prohibition against altering the order of succession with irritant and resolute clauses, the clause is defective, and the entail invalid in regard to all the prohibitions therein contained.

1st Division. This was an action of declarator, brought at the instance of Robert Ferguson, Esquire, heir in possession of the entailed estates of Raith and Others, against James Ferguson and Others, heirs of entail called to the succession after the pursuer. These estates are entailed upon the same series of heirs by two dispositions and deeds of tailzie, executed in 1768 and in 1829 respectively. The estates were transferred, by Act of Parliament, to trustees, for the purpose of selling so much of them as might be necessary to pay the debts of the late Robert Ferguson of Raith. John Dundas, Esq., C. S., is the sole surviving trustee. The action concludes to have it found and declared, that the entail is defective, in respect that the prohibition against altering the order of succession inserted in the deeds of tailzie is not duly fenced with valid and effectual, irritant and resolute clauses, and that therefore, in terms of the 11 and 12 Vict. c. 36, it shall be deemed and taken to be invalid and ineffectual, in regard to all the prohibitions therein contained, and that upon the pursuer making payment of the debts and expenses affecting the estates vested in Mr Dundas as trustee, Mr Dundas shall be bound to convey the same to him and such series of heirs as he shall appoint, freed from the prohibitions and fetters of the entail, and that he has all the rights thereto of an ordinary fee simple proprietor. The clause referred to is as follows:—

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Ferguson, &c.

"That it shall no ways be lawful for any of the said heirs of tailzie, nor to their heirs who shall have the right of succession, severally to alter or infringe this present destination and tailzie, nor the order and course of succession hereby appointed, nor to give, grant, sell, or alien, or dispose the lands, baronys, and others particularly and generally above disposed, or any part or portion thereof, either irredeemably or under reversion, or to grant woodsets or infeftments of annualrents furth thereof, or to affect the said lands with any servitudes or other burthens, or to let tacks for any longer time than nineteen years or the setter's lifetime in his or their option, but not under the usual

and true rent, neither shall it be lawful for them or any of them, nor in their Nov. 18. 1852.
 or either of their powers to contract debts, or to grant any security or obligation for the same upon which any decree of adjudication may follow, nor to Ferguson v. Ferguson, &c.
 do any other act or deed civil or criminal whereby the said lands baronys and others foresaid or any part thereof may be adjudged or any other manner of way evicted or forfeited by or from them or either of them, or by which the order of succession hereby established may any way be hindered or altered or interrupted in prejudice of the said succession or of those who by virtue thereof shall then have right to succeed declaring that if the said heirs of tailzie or any of them shall contraveen or do in the contrary hereof either by disposing the estate or any part thereof by contracting of debts by which adjudications may follow or by doing any other act or deed civil or criminal whereby the said estate or any part thereof may be judged or evicted in any manner of way then and in either of these cases the said debts and deeds and all and every one of them shall not only become *ipso facto* void and null in so far as concerns the lands baronys and others foresaid so that they shall not be affected therewith in prejudice of the next heirs who are to succeed seeing these presents are made with the provisions above specified and not otherwise but also the contraveener shall ammitt and lose all right and title to the s^d lands baronys and others above expressed," &c.

The Lord Ordinary (Wood) "Finds, decerns, ordains, and declares in terms of the conclusion of the libel, but finds no expenses due."

The defenders reclaimed.

Maitland, for the reclaimers. From the peculiar manner in which this clause is worded, it is assimilated to the case of the *Roxburgh* entail. The concluding portion of the clause is satisfactorily referred to in the irritant and resolute clauses; *Rowe v. Monypenny*, 9th February 1837.

LORD IVORY suggested that it had not yet been decided that the prohibitions against altering the order of succession required any irritant and resolute clauses in a question *inter heredes*.

T. Mackenzie and Dundas, for the respondents, referred to the case of *Cunninghame*, 9th March 1852, as practically deciding the necessity for having such clauses.

The LORD PRESIDENT. A prohibitory clause that is not fenced is not effectual. It may be so to some purposes, but being so, it is defective. As to the reference to the prohibitory clause in the irritant and resolute clauses, I think the case falls within the rule of the other cases that have been decided. The prohibitory clause here is quite complete; the irritant clause is on the principle of enumeration. There are four matters that are prohibited; there are only three set forth in the irritant clause, and therefore I must hold it to be a defective clause: and if that be so, I think that the prohibitory clause altering the order of succession being not fenced by irritant and resolute clauses is therefore defective.

LORDS CUNNINGHAME and IVORY concurred.

LORD FULLERTON absent.

The COURT "Refuse the prayer of the reclaiming note, adhere to the in-

Nov. 18. 1852. terlocutor of the Lord Ordinary reclaimed against, and find no expenses due."

Ferguson v.
Ferguson.

Dundas and Wilson, C.S., Pursuer's Agents.

Mackay and Howe, W.S., Defenders' Agents.

(J. S. M.)

No. 14.

M'NAUGHTON AND BRUCE v. BARR AND OTHERS.

Arbitration—Accounting—Power of arbiter as to getting information.—In a submission in regard to a matter of accounting, *Held*, That the arbiter might competently seek information as to the subject of reference from third parties, although the parties to the submission were not present,—

Observed, That objections to his doing so must, to a certain extent, be judged of *secundum subjectam materiam*.

1st Division.

Nov. 18. 1852.

M'Naughton
and Bruce v.
Barr, &c.

In this case there were two conjoined actions, of which the leading one was a reduction of a decree arbitral. In the reduction, probation was renounced. The action proceeded on various allegations of collusion and irregularity, on the part of the arbiter; and the circumstances out of which both actions arose were as follows:—Barr and others were owners of a vessel called the "Countess of Eglinton." They appointed Wilson to be ship's husband; and he acted as such for several years. But in 1847, his affairs became deranged, and Barr, one of the owners, was appointed in his stead. After his appointment, Barr as acting for himself, and the other owners, called Wilson to account for his intromissions, and the result was, that the parties entered into a submission to an arbiter. Wilson conceiving that on his intromissions there was a large balance due to him, proposed that he should be allowed to draw from the homeward freight of the vessel, for the last voyage during his office of ship's husband, the sum of L.700. He was allowed to do so on a guarantee being granted for repayment of that sum or such part of it as should be found due by him. Bruce, one of the pursuers in the reduction, granted a guarantee for such repayment. Soon after the date of the submission, Wilson's estates were sequestrated, and M'Naughton, the other pursuer in the reduction, was appointed trustee. The arbiter eventually found a balance of L.680, due by Wilson to the ship's owners, and this decree-arbitral M'Naughton and Bruce now sought to reduce, mainly on the allegation,—the other reasons of reduction not being insisted on—that the arbiter at the request of the pursuers held various communications with other parties, and particularly with a Captain Grange and a Captain Syme, and proceeded on the information and statements so obtained by him from these parties, in debiting Wilson with considerable sums of money, for which there were no vouchers or other authority whatever. Founding on the guarantee granted by Bruce, the counter action which was conjoined with the reduction, was brought by the owners of the vessel.

The defenders admitted that the arbiter had one or two personal interviews with Captain Syme and Captain Grange, in order to obtain some explanations relative to the ship's affairs, these persons having acted successively as masters of the ship during Wilson's ship-husbandry: but under the explanation that these interviews were had by the arbiter spontaneously and not on the suggestion of the pursuers; and that none of the parties on either side were present at the interviews. The alleged result of these interviews was denied.

The Lord Ordinary (Robertson) held, 2d, "That the amount Nov. 18. 1853, fixed by that decree-arbitral must be held to be correct, seeing that no specific error is averred, and the pursuers decline to undertake a proof of any such error by- remit to an accountant or otherwise:"—3d, "That ample opportunity was allowed to the parties to be heard, and full access afforded to the arbiter's notes, whole vouchers, and documents:—and, *lastly*, "That there is no proof of legal corruption,—therefore in the reduction repels the reasons of reduction, sustains the defences, assoilzies the defenders, and decerns Finds the defenders, William M'Naughton and Alexander John Bruce, liable in expenses," &c.

In the note appended to his interlocutor the Lord Ordinary remarked, "The pursuers of this reduction have not specially averred that any thing improper took place at these meetings, far less have they sought to examine either the arbiter, or the clerk to the submission or Mr Barr's clerk, or Captain Grange, or Captain Syme, with whom also the arbiter seems to have had communications. They leave the matter entirely *in the dark* as to any thing which took place at these supposed meetings, and trust to inferences and insinuations derived from the correspondence, and which the examination of such parties might have confirmed if the insinuations had been just, or have refuted if unfounded Considering therefore the very limited nature of the inquiry in the case—the ample opportunities afforded for correcting any error in the accounts—the inability on the part of the pursuers to point out any error even now in these accounts—and the refusal to enter into any investigation as to the state of the accounts, or to shew that any other result could be arrived at than the one to which the arbiter has come—nothing appears to the Lord Ordinary to have occurred in the course of this submission, which was protracted far beyond what the parties originally contemplated, to set aside the award fixing a true balance."

Against this interlocutor M'Naughton and Bruce reclaimed.

Macfarlane and *Moncreiff* for the reclaimers. We are not bound to ascertain that the award is good. The parties were not put on an equal footing. The arbiter was not entitled to hold these meetings without the knowledge of the reclaimers. We do not say that the arbiter did not intend to act fairly, but he has greatly mistaken his duty, and the irregularity is therefore fatal to the award; *Heggie and Company v. Stark and Selkrig*, 1st Feb. 1825. *Dunmore v. M'Inturner*, 28th January 1835, 13 S. 356. *Harvey v. Shelton*, 13 Law Journal, Equity Reports, 466, also 7 Bevan's Chancery Cases, 465; *Thomson v. Brougham*, 14 Law Journal, Queen's Bench Reports, 17. *Hughes v. Middleton*, 14 Law Journal, Queen's Bench Reports, 139.

Penney and the *Lord Advocate*. In the absence of any allegation of bad faith on the part of the arbiter or of any attempt to set him right, it is not a sufficient reason to set aside this award to say that the reclaimers had not received intimation of these examinations. If the arbiter had taken Captain Syme's word for a voucher, the parties have mistaken their remedy. They had an opportunity of examining the accounts, and of challenging the arbiter to produce his vouchers. By the act of regulations, this award cannot be reduced except on the ground of corruption. It cannot be set aside on the ground of

Nov. 18. 1852—*form. merely.* Gross misconduct must be alleged and proved on the part of the arbiter. *Mitchell v. Cabell*, 17th June 1848, D. 10, 1297.

McNaughton
and Bruce v.
Barr, &c.

The LORD PRESIDENT. I do not think there are here proper grounds of reduction. The only thing now said is relative to the meetings of the arbiter with Captain Grange and Captain Syme. In a question of this kind it is of some importance to look to the nature of the submission to see what the arbiter had to do, what was produced to him, and the nature of the communications made to him. Now this was entirely a matter of accounting, and it does not appear to me that he acted improperly in what he did. I agree with the pursuers that it is not necessary for them to establish that the arbiter had arrived at a wrong result. I am inclined to refuse this note, at the same time that I cannot concur in the second finding of the interlocutor.

LORD FULLERTON. I am of the same opinion.

LORD CUNINGHAME. I agree with your Lordship that there is no ground on which we can safely disturb the decree-arbitral now challenged. At the same time, we are not to be understood as relaxing, in any respect, the rule that no arbiter can receive proof (properly so called) in absence of either of the parties; but I do not consider that the arbiter here violated the laws in any respect in the present instance. Objections of this description must, to a certain extent, be judged of *secundum subjectam materiam*. Now, as the reference here truly related solely to the audit, or adjustment of a ship's accounts, it would have been superfluous and oppressive for the arbiter to summon formal meetings of the parties and their agents, on every small point of detail, on which he could easily get information by inquiry at third parties, subject to the ultimate correction of the parties. No such practice is followed by auditors or accountants in analogous business. And when it is proved here that the arbiter openly announced to the parties his intention to confer with Syme, and afterwards gave each of them a full opportunity of seeing and objecting to each and all of the articles of the accounts sustained by him long before he issued the decree-arbitral, the plea of the pursuers, even as latterly restricted, seems, in every view, altogether untenable.

LORD IVORY. I am of the same opinion. I do not think it necessary to go over the grounds occurring to me in reference to the expediency of withdrawing the second finding, because, as it is put, it is put as a matter of law. It is a good observation on the evidence, but I think it is unnecessary.

The COURT "recal the second finding in the Lord Ordinary's interlocutor as unnecessary, and, *quoad ultra*, adhere to that interlocutor and refuse the note; find additional expenses due," &c.

John Leishman, W.S., Pursuer's Agent.

Campbell and Smith, S.S.C., Respondent's Agents. (J. S. M.)

CAMPBELL v. CAMPBELL'S TRUSTEES.

Equitable jurisdiction—Construction of deeds—Intention of parties.—In the construction of a trust disposition, the Court, in the exercise of its equitable jurisdiction, will give effect to the apparent intention of the trustor where no legal or equitable interest will be injured by doing so, although the literal reading of the deed might admit of a different interpretation.

This was an action of declarator at the instance of Campbell of Monzie 1st Division. against his father's trustees. The late Campbell of Monzie executed an entail in favour of the pursuer; he subsequently executed a trust-disposition in order to provide for paying off certain debts and provisions therein mentioned. By the *seventh* and *eighth* purposes of the trust, the trustees after implementing the whole purposes, and defraying expenses, are taken bound (1.) to invest any residue of the funds in their hands, provided the sum shall exceed L.500 sterling, in the purchase of "such lands or other heritages as may be most convenient or contiguous to the rest of the estate, and they shall complete titles to the same in their own persons;" and (2.) after the other purposes of the trust have been "fully implemented, to execute a strict entail of the whole lands, including such other lands and heritages as may have been purchased by my said trustees in manner foresaid." The purposes of the trust have now been implemented; and a balance of about L.3500 remains in the hands of the trustees. The action now raised concluded that it should be found and declared "that the defenders are bound to execute an entail of the lands and estates now vested in their persons as trustees, in favour of the pursuer, and of the heirs substituted to him, in terms of the foresaid trust-deed, the pursuer, at the same time, executing in their favour an ample discharge of all their actings and intrusions with regard to the trust, reserving his rights and the rights of all parties, as regards the foresaid uninvested balance of the trust-funds."

Nov. 19. 1852.

Campbell v.
Campbell's
Trustees.

The trustees pleaded that no power is conferred upon them to execute more than one deed of entail, or to execute any such deed, except at the termination of the trust, after the whole of the truster's directions, including that of investing the floating funds remaining in the trustees' hands, have been fully implemented.

The Lord Ordinary (Dundrennan) repelled the defences, and declared in terms of the conclusions of the libel, holding it to be "more in accordance with the general object and purposes of the trust, and with what may fairly be presumed to have been the intention of the granter, that his trustees, in the peculiar circumstances in which the trust is now placed, should denude to the effect required by the pursuer."

The trustees reclaimed.

G. Young and *G. G. Bell* for the reclaimers.

Ross and the *Solicitor-General* for the respondent.

LORD FULLERTON. We give relief of this kind every day—as in the case of annuities, for example, and I am not inclined to follow a different course in this case.

LORD CUNINGHAME. This proceeding is for the interest of the estate. The balance the trustees have got in their hands may be invested in any windfall that may occur in subsequent years.

LORD IVORY. I am of the same opinion. The case to which Lord Fullerton has referred, shews the power and the practice of the Court to interfere when there is no legal or equitable interest to be affected by it. The Court has anticipated the period in the case of annuities, at which by the literal meaning of the deed, the annuity was strictly due, and put the matter on a foot-

Nov. 19. 1852. ing more substantially in accordance with the intention of parties. Now here we have a deed in itself not very clearly expressed. One can see, however, what the purposes of the truster were. But what we are entitled to go on, is this, that the time when this fund was to be invested in the purchase of lands according to the intention of the testator has arrived. The fact is, there is a difficulty in the way of investing, but are we not to give effect to the intention of the testator so far as practicable? If an objection could be stated by which the interest of any party would be injured, that would be a different thing. But no such objection being stated, it is our duty to give effect to the testator's intention so far as we can.

Campbell v.
Campbell's
Trustees.

The LORD PRESIDENT. I concur with the views now expressed. We must look to the true meaning of the party executing this deed, not doing violence however to the expressions contained in it. Now it appears to me, that the period for investment has arrived,—the period when the testator intended that his son should receive the estate. It may be, the trustees are acting with great wisdom in what they are doing. There is a possibility of investing; but it is considered to be not expedient to do so, therefore we come to consider, whether by the word, “a deed of entail,” the trustees must delay till they are able to embrace the whole entailed estates in one deed. I think it is an entail whether it be contained in one deed or in two, therefore I do not think we are doing violence to the substance of the thing, nor going farther than the Court has gone in other cases in affirming the interlocutor of the Lord Ordinary.

The COURT “refuse the prayer of the reclaiming note, and adhere to the interlocutor of the Lord Ordinary reclaimed against,

Robert Haldane, W.S., Pursuer's Agent.

Davidson and Syme, W.S., Defenders' Agents. (J. S. M.)

No. 16.

PRIMROSE v. PRIMROSE.

11 and 12 Vict., c. 86—*Disentail—Sale of Lands—Suspension and Interdict.*—Where a disentail of certain lands had been effected, and, after the lapse of two years, the proprietor was about to expose them to sale,—Circumstances in which the Court refused a note of suspension and interdict against the sale proceeding, presented without caution by a party claiming to be an heir-substitute, and one of the three next heirs of entail.

1st Division.

Nov. 20. 1852.

Primrose v.
Primrose.

This was a note of suspension and interdict, presented for the purpose of preventing the sale of the lands of Burnbrae, of which the respondent is proprietrix. In 1850 a disentail of these lands was effected, under the 11 and 12 Vict. c. 36, by the respondent, as heiress in possession, after the requisite publication in the Gazette and other legal notice, and the opportunity given which the statute requires for any objection to be stated to the procedure. Thereafter the respondent, finding it necessary to dispose of the whole of the lands so disentailed, exposed them to sale in July and October 1851, and July and September 1852. On the latter occasion, before the exposure of the lands for sale, a schedule of protest was served upon the auctioneer against the sale proceeding, and afterwards a note of suspension and interdict was presented with the same view to the Lord Ordinary on the Bills (Rutherford). The note was presented without caution. The suspender claimed the character of an heir substitute and one of the three nearest heirs

of entail; and he pleaded that the sale was injurious to his interest, and that the disentail had not been validly effected, in respect that two of the parties whose consents were obtained were not heirs of entail, nor at all related to the entailor's family and the respondent. Nov. 20. 1852.
Primrose v.
Primrose.

The Lord Ordinary refused the note, and found the suspender liable in expenses. In the note appended to his interlocutor, his Lordship remarked, "it is proposed to prevent a party calling himself the proprietor of an estate from selling it. It is a new process to interfere by suspension with the exercise of such a power; suspension is not a known diligence in the law like inhibition applicable to such a case. If the party were truly the proprietor and made the sale, the sale could not be set aside as contrary to interdict. On the other hand it would be of the worst example, and might be of the deepest injury, to prevent a proprietor from selling and conveying his right to others simply because that right was subject to some legal challenge. This would be to introduce a new diligence, and under a question of interdict any right of property might be tried."

The suspender reclaimed.

Pattison was for the reclaimer (suspender).

Mailland and *T. Mackenzie* for the respondent. There is no *prima facie* evidence to support the suspender's statement. If there is a question to try at all, a reduction is the proper course to adopt.

The LORD PRESIDENT. The respondent has carried through a disentail that is complete. Since the date of the disentail the statutory period of two years has elapsed. She is now acting under the powers which the statute gives her, having published the various requisite legal notices, but to which the claimant has paid no attention. In these circumstances she now proceeds to exercise the powers of a fee-simple proprietor. Until the date of the proposed sale of the lands the suspender makes no objection. In this state of matters it would be dangerous for us to allow a party who pretends to the interest in the estate claimed by the suspender thus to interfere with another party who is the absolute proprietor of the estate. If any other party lays claim to it is he also to get on the instant an interdict? That is not the way to recognize his claim. His interest to obtain the interdict is very clear in some respects, because he has now lost his statutory interest. But there are other ways in which that interest, if good, might be established; but on the challenge of the estate by a party whose own title is questionable, whose pedigree is not established, and whose imputation against the pedigree of the other party is denied, to allow him to interfere with the actual fee-simple proprietor by interdict, and that, too, without caution, is not to be entertained.

LORD CUNINGHAME. I agree.

LORD IVORY. I am of the same opinion. This party has not made a *prima facie* case of title at all. His case rests on mere allegation, and that stands against a *prima facie* case of title. Whilst parties are in that condition we cannot, without caution, at all events, allow the right of the respondent to be interfered with.

The COURT "adhere to the Lord Ordinary's interlocutor submitted to review,

Nov. 20. 1852. and refuse the note, Find additional expenses due, and remit to the Auditor to tax the account when lodged, and to report to the Lord Ordinary, and remit to his Lordship to decern for the expenses."

Primrose v.
Primrose.

James Bell, S.S.C., Reclaimer's Agent.
James Dalgleish, W.S., Respondent's Agent.

(J. S. M.)

No. 17.

RAE v. M'LAY.

Jury Trial—Expenses.—In an action of damages for defamation, the jury found for the pursuer with one farthing of damages. Expenses allowed.

1st Division. This was an action of damages for defamation. The jury found for the pursuer, with one farthing of damages. The question now was whether this
Nov. 20. 1852. carried expenses.

Rae v. M'Lay. *Monro and G. G. Bell* for the pursuer. There is only one case in which expenses have been so refused in a question of character; *Mason v. Tait*, 2d July 1851, 13 D. 1282. In the case of *M'Intosh v. Flowerden*, 3d December 1851, damages were assessed at one farthing and expenses allowed.

E. S. Gordon, and *The Solicitor-General*, contra.

The LORD PRESIDENT. This raises a very general point. The general rule is, that the party who brings an action in order to vindicate his character is entitled to the costs of his action. The action is necessary to vindicate his character. The party may meet the case by a distinct retraction on the record of the statement he has made. That was not done here. There are not grounds here for making a distinction from the general rule. The jury gave only nominal damages; that was enough to vindicate the pursuer's character. But the great expense here has been incurred in proving the fact that was denied, which was a step towards obtaining the pursuer's vindication of his character, and, therefore, I think he is entitled to his expenses.

The other JUDGES concurred.

Expenses allowed.

J. Ronald, S.S.C., Pursuer's Agent.
James Peddie, W.S., Defender's Agent.

(J. S. M.)

No. 18.

Petition, CHRISTIAN SOUTER and OTHERS, for Judicial Factor.

6 Geo. 4, c. 62, *Act of Grace—Equitable Jurisdiction—Removal of Trustee.*—Circumstances in which a trustee on a bankrupt estate, appointed under an application by the bankrupt for the benefit of the Act of Grace, was removed and a judicial factor appointed.

1st Division. This petition set forth that in May last, Peter Souter was incarcerated on diligence, at the instance of the respondent Alexander Brown, writer in Stonehaven, for non-payment of a bill for L.21 : 7 : 4. That he was liberated on signing a disposition *omnium bonorum* in favour of Brown, under an application for aliment on the act of grace; but that all this was purely a collusive proceeding. And the petition after stating that Mr Falconer, writer in Stonehaven, was appointed clerk to the trust, narrates that before or soon after the date of the disposition, sequestration was used against Souter at the instance of the landlord of Souter's farm for past due rents. Falconer paid the rent and

Pet. Christian
Souter, &c.

took an assignation to the hypothec, under which he roused the whole stock-^{Nov. 20. 1852.} ing of the farm. Brown, the trustee, in conjunction with Souter, renounced the lease, and Brown now intends to sell the grain and green crop, and to draw the proceeds, which, with the value of the stocking, would amount to the sum of L.1297, and would leave for the ordinary creditors, after deduction of the preferable claims, a sum of about L.727. That these proceedings have been adopted without consultation with the creditors; and that the petitioners, who are the chief creditors, becoming apprehensive from the state of Brown's pecuniary circumstances, that the funds would not be safe in his hands, had called on Brown by letter to find caution for his intromissions, failing which they would apply to the Court for redress. Brown declined to comply with this requisition. Souter then called a meeting of his creditors, which Brown was requested to attend; and the minutes of the meeting bear that Souter explained "that the trust-disposition in favour of Brown was arranged for the purpose of putting certain of his creditors at defiance." That Brown refused to resign as trustee, or find caution for his intromissions; and that the meeting "expressed their strong disapprobation of the whole conduct of the trustee, and their entire want of confidence in him; and believing, from the state of his own pecuniary affairs—he being frequently under diligence at the instance of his creditors—that the trust-funds would not be safe in his hands, they authorised" two of their number "to apply to the Court of Session, in name of Mr Souter and the creditors present, or represented at this meeting, and of such other creditors as shall concur, to have a judicial factor appointed on the estate, to supersede Mr Brown as trustee, or to have him compelled to find security before he intromits further with the funds, and generally to adopt such judicial proceedings as they may consider proper and necessary in the circumstances for the safety and protection of the creditors, and for preventing further interference and intromission by Mr Brown with the estate." The petition therefore prayed for the appointment of a "judicial factor, with all the usual powers, to sequestrate the said trust-estate, if necessary; and to remove the said Alexander Brown from the office of trustee thereon."

No answers were lodged to this petition, but at the calling to-day

Millar appeared for the trustee, and stated that the trustee was now prepared to find caution for his intromissions.

Monro for the petitioners argued that they were not now bound to receive such caution, and referred to the case of *Douglas and Others*, 19th December 1840, 3 D. 315.


LORD IVORY. This estate is in a most unsatisfactory condition. It is impossible to look to the origin of this trust without having a strong suspicion that the allegation of collusion in this petition is correct. The trust deed was granted under the Act of grace, 6 Geo. IV. c. 62, which provides that the party claiming the benefit of the Act shall be bound, when required, to execute a disposition *omnium bonorum*, in favour of his incarcerating creditor. The trust therefore contemplated here is one subsidiary to the application in which it is granted, and that application is one in which the debtor must make oath

Nov. 20. 1852. *that he has not wherewith to aliment himself. The general case, therefore, in which such trusts are called for, is where the debtor has not the means to aliment himself, and therefore the incarcerating creditor, in order to test the bona fides of that allegation on the part of the debtor, and to place the estate on a proper footing for the creditors, is entitled to get a disposition omnium bonorum. But I do not see how a trust of this kind is fairly to be carried into effect as an administrative trust at all. The machinery is not given, and therefore the conclusion to which my mind at present comes, is that it is not a trust applicable to such circumstances as those in the present case. The terms of the disposition granted in this case we have not before us, but this appears, that an estate to the value of L.1297 has got into the possession of this Mr Brown, the incarcerating creditor, and that after paying the preferable debts, there is a large balance to which the general creditors have a claim, instead of there being merely a subsidiary fund for the aliment of the debtor; therefore entertaining the strongest feeling of suspicion as to the substance of the case, I cannot help entertaining doubts as to the competency of this proceeding altogether, or as to the expediency of thus laying down a form of practice before we have considered to what it may ultimately tend. The proceeding arose on the meeting of certain of the creditors, not properly called as in a sequestration or the administration of a general trust estate, and they issue a mandate to certain of their number as to the course to be adopted by them. Now with regard to the general clause appended to this mandate, I am inclined to read it as *ejusdem generis* with what went before, and, therefore, it must be read as an alternative mandate. But in as much as there is no prayer here for the security contemplated by the meeting, I doubt whether the petition is within the terms of the mandate. Again, the petition is directed to be made in the names of two of the creditors therein named. It is not so made. But then comes the pinch of all. I doubt how far under a trust of this anomalous kind, the Court can in this incidental way, take the administration of the trust into their own hands. How are they to deal with the interests of absent creditors, &c. ? These are difficulties which I should like to consider before introducing for the first time a rule which we must afterwards carry out. I would like to see this estate placed under a general administration. It is not so at present, and therefore I would hesitate to grant the prayer of this petition, 1st, because it is not in accordance with the terms of the mandate; and, 2d, because I doubt whether a judicial factory is the kind adapted to the circumstances of this case.*

*Pet. Christian
Souter, &c.*

LORD CUNTINGHAME. I confess that I do not feel the doubts of my brother in this case to the extent to which he has expressed them. On the contrary, I was inclined to think, that possessing, as we do, the powers of a Court of Equity, this was a case in which we were called to make the appointment craved, for the interests and safety of creditors in jeopardy.

The present case belongs to a class in which, occasionally, important interests may come to be involved. In processes of *cessio* and of *aliment* under the Act of Grace, debtors before getting relief must, by statute, grant trust-dispositions to parties often named by incarcerating creditors generally for small debts. In the great majority of cases, these are very trifling trusts attended

with expense instead of dividend. Yet in some cases an unexpected addition Nov. 20. 1852.
occurs to the bankrupt's funds, which every prudent claimant would think
unsuitable for the management of a humble or precarious functionary selected  Pet. Christian
when the amount of the fund was not anticipated. Souter, &c.

In such cases as the present, and probably in others analogous, it humbly appears to me, that it is the duty of a Court of Equity, without giving effect to critical objections, to make an appointment for the safety of creditors. More especially is this called for where hazard is justly apprehended from the intromissions of a trustee named on an emergency by force of a statute, and under circumstances not foreseen at the date of the appointment. Indeed, if the circumstances here stated by leading creditors be at all correct, the case may be considered on the eve of a competition by a process of *multiplepointing*, which the creditors must bring without delay when the fund is dispensed. In this as well as in every view, a fund to the amount of that stated without contradiction in the petition, should not be allowed to remain in the hands of the individual who at present holds it.

On the whole, it appears to me that the doors of a Court of Equity should generally be open to the summary remedy of an interim judicial management to protect the funds of creditors and absentees when in imminent hazard; and that the present case falls within that rule seems to me very clear from the statement given as to the trustee's circumstances without any specific contradiction in these papers. No creditor of any amount proposed the nominal trustee in the first instance, or now supports his continuing in the intromission of the funds.

The LORD PRESIDENT. I have a good deal of difficulty in point of form; at same time, I see the position the creditors are placed in. They have increased our difficulties by the course they have taken themselves; 1st, they take the trust as a collusive trust, while, at the same time, they wish to keep it alive and make it the subject of judicial management; 2d, they desire the trustee to find caution, and when he offers it they refuse to take it; 3d, they give certain parties authority to apply to the Court in a way that when these parties appear, we are at a loss to know whether their application is in accordance with the authority so given them. But one thing is clear, that the affairs of the trust are in a most unsatisfactory position, and that the interest of the creditors is in danger. Brown is not a desirable trustee; for the creditors have expressed their want of confidence in him, and they have made certain statements with regard to him and the origin of the trust which he has not thought fit to answer. I can hardly assume, therefore, that these statements in the petition are groundless. I feel the difficulty that has been pressed by Lord Ivory as to the limited nature of the trust. But suppose the case of a disposition granted for the purpose of complying with the Act of Grace, and it turns out that the trustee therein named conducts himself in a way that is adverse to the interest of the creditors, at least that they allege it to be so, and that he does not contradict the allegation, and that his circumstances are in the position of this person, have we not power in such a case to appoint a judicial manager? I should be sorry to think we had not. I rather think we have, and, therefore, I am inclined to take the views of Lord Cuninghame.

Nov. 20. 1852. LORD FULLERTON was absent.

The COURT therefore granted the prayer of the petition, and appointed a Pet. Christian judicial factor on the estate.

Souter, &c.

Webster and Rennie, W.S., Petitioners' Agents.

——— *Stratton, S.S.C.,* Respondent's Agent.

(J. S. M.)

No. 19.

LAW v. THOMSON.

Process—Suspension—Reclaiming Note.—The Lord Ordinary having refused a note of suspension, on the ground of delay in taking the charger's oath, which had been referred to:—*Held* that a reclaiming note was a competent mode of proceeding on the part of the suspender, and that a new note of suspension was not necessary.

2d Division.

Nov. 20. 1852.

*Law v.
Thomson.*

This was a suspension of diligence, in which a reference was made to the oath of the charger. The oath had never been taken, and the charger had moved the Lord Ordinary to refuse the note of suspension on the ground of delay. This was granted by the Lord Ordinary, and the suspender reclaimed.

P. Fraser, for the respondent and charger, objected to the reclaiming note as an incompetent mode of proceeding, maintaining that a second note of suspension ought to have been presented, which would have given him, (the respondent), an opportunity of securing caution for expenses, (see Act of Sederunt, 4th Sept. 1838, sec. 5).

Pattison, for the suspender, argued that both proceedings were competent.

The COURT found that a reclaiming note was a competent mode of proceeding.

James Bell, S.S.C., Suspender's Agent.

Barron and Hagart, W.S., Charger's Agents.

(W. H. T.)

No. 20.

JAMES GRAHAM & MANDATORY v. JOHN GRAHAM.

Protestation—Sederunt Day.—A protestation is effectual though taken out during the sittings of the Outer House, before the sittings of the Inner House have begun.

2d Division.

Nov. 17. 1852.

*Graham and
Mandatory
v. Graham.*

This matter was verbally reported by Lord Anderson. The defender had taken out protestation on 2d November, for not enrolling. It was extracted on the 12th. Notwithstanding this, the pursuer had enrolled the cause in last week's printed roll. The defender pleaded "no process," the case being out of Court by protestation. The pursuer replied that there was no legal protestation, the 2d of November not being a Sederunt Day, and referred to the Act 2 and 3 Vict. c. 36, by which it is provided, sec. 10, "that Sederunt Days shall be reckoned from and regulated by the meetings of the Inner Houses of the Court, and not by the sittings of the Lord Ordinary."

The COURT had no difficulty. The power of preventing needless delay, by protestation, exists in the Lords Ordinary during their sittings, before the meeting of the Inner House, as much as any other power incident to their office.

C. Scott, for pursuer. *Horn*, for defender.

James Bayne, S.S.C., Pursuers' Agent.

James Grahame, W.S., Defender's Agent.

(W. H. T.)

BALLINTEN & MANDATORY v. CONNON.

No. 21

Diligence—Place of residence.—A charge upon a bill left at the acceptor's father's house in Aberdeen, where he was in the habit of living when in Scotland, where his domicile of birth was, he having acquired no other, and the bill being addressed to him as "shipowner in Aberdeen," held to be regular.

This was a reduction of a diligence on which the bankruptcy of Leask pro-2d Division. ceded, on the ground that the charge upon a protested bill was inept, in respect that it had been left at the acceptor's father's house in Aberdeen, while the acceptor himself was not resident there, and had not even a Scottish domicile. The bill, however, had been addressed to him by the drawer, as "William Leask, shipowner in Aberdeen," and was payable at a bank in that town. It was proved that, at that time, he was a sailor by profession, and had acquired no domicile *by residence* anywhere, but that when in Scotland he always resided in his father's house, where he had been born and brought up, and where the charge had been left.

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Ballinten and
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Logan, with whom *Moncreiff* and the *Lord-Advocate (Inglis)*, for pursuer.
Shand, with whom *Deas*, for defender.

The COURT unanimously found that the diligence was regular, and repelled the reasons of reduction.

James Marshall, S.S.C., Pursuers' Agent.

Shand and Farquhar, W.S., Defender's Agents.

(W. H. T.)

LANGS v. BROWN.

No. 22.

Arbitration—Decree—Prorogation—Power of Oversman.—In a submission which had been prorogated, the arbiters issued notes against which they allowed parties fourteen days to reclaim. Before the expiry of that period, they devolved two points on which they differed on an oversman. Soon thereafter, the prorogation current at the date of the issuing the notes and of the devolution being about to expire, the oversman further prorogated the submission, and eventually the arbiters issued a decree in terms of their notes. In a reduction of this decree on the ground, *inter alia*, of its being issued beyond year and day from the date of the last prorogation by the arbiters themselves :—*Held*, in conformity with the opinions of a majority of the whole Court, that the prorogation by the oversman was sufficient to keep alive the submission, to the effect of enabling the arbiters to pronounce such a decree.

This was a reduction of a decree-arbitral on the ground of corruption and irregularity on the part of the arbiters. To the latter of these grounds of reduction, the attention of the Court was, for the present, exclusively directed.

1st Division.

Nov. 23. 1852.

The pursuers are owners of a vessel on account of which certain advances had been made by the defender. Disputes having arisen between these parties with regard to their accounts, they agreed to submit their differences to the decision of two arbiters, with power to choose an oversman in case of their differing in opinion. The terms of the submission bore, "That whatever the said arbiters or oversman shall determine in the premises by decret-arbitral, or decreets-arbitral, interim or final, to be pronounced by them between the day of next to come, or betwixt and any other time to which the said arbiters or oversman shall prorogate this submission, which they are hereby authorised to do at pleasure, the said parties bind themselves to implement to each other," &c.

Langs v.
Brown.

Nov. 23. 1852. The submission was entered into in 1843. It was prorogated from time to time by the arbiters, who, in September 1845, issued an interim decree-arbitral, and again on 10th November 1846, issued notes deciding all the points on which they agreed, and allowing any representation against them to be received within fourteen days. They also devolved two points on which they differed on Mr Andrew Lindsay as an oversman. In the minute of devolution, the arbiters, after stating the two points on which they had differed in opinion,—the power to appoint an oversman, and the appointment of Andrew Lindsay to the office,—“refer the said two points on which we differ to his determination, and devolve the submission on him, to that extent, with all the powers competent to the office of oversman.” The last prorogation by the arbiters was dated 18th and 20th December 1845; therefore the prorogation current at 10th November 1846, the date of this interlocutor, expired in December thereafter. The devolution had been made on the 10th and 16th November 1846, and on the 18th December, the *oversman* prorogated, and adjourned the “submission and the period for deciding the matter referred to the day of next.” Thereafter, on the 24th and 28th days of May 1847, the arbiters pronounced a decret-arbitral in terms of the interlocutor of November 1846. The validity of this decret thus depended upon the efficiency of the oversman’s prorogation of December 1846 to keep the submission alive, so as thereby to enable the arbiters competently to pronounce it. In June following, the oversman pronounced his decree. These were the proceedings challenged in the reduction.

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Pending the submission in February 1845, the pursuers intimated by letter to the clerk of the submission, that, for certain reasons therein mentioned, they repudiated the proceedings: they now pleaded, *inter alia*, as grounds for the reduction of the arbiter’s decree in May, and the subsequent decree by the oversman in June 1847; 2d, “The decret of May 1847, pronounced by the arbiters, having been pronounced after the lapse of more than a year from the date of the previous prorogation by the arbiters, is legally inept and void.” 3d, “The pretended prorogation by the oversman is inept and ineffectual, first, because the appointment of the oversman being made after the arbiters had been certified that the pursuers repudiated the proceedings, . . . was illegal and void; and second, because, as the devolution upon the oversman was limited to two special points, the case remaining with the arbiters, *quoad ultra*, he had no power to prorogate the submission, *quoad* the points which were so reserved for the consideration of the arbiters themselves; 4th, If the decret of May 1847 be null and void, the decret sought to be reduced must fall *in toto*. First, because in that view the arbiters have not exhausted the submission; and second, because, as the subsequent decret pronounced by the oversman is bottomed upon the previous judgment of the arbiters as valid and effectual, it cannot be supported if that previous decret is found to be unavailing.”

The defenders pleaded generally that the proceedings were regular, and that at any rate the pursuers were barred by homologation from urging the alleged irregularities.

The Lord Ordinary (Wood) “finds that the decret-arbitral of the arbiters of date the 24th and 28th days of May 1847, is ineffectual and null and not

binding on the pursuers, and reduces and annuls the same accordingly, and Nov. 23. 1852. decerns."

The defenders reclaimed.

Lange v.
Brown.

Macfarlane and *Marshall* (now Lord Curriehill) for the reclaimers.

Moir and *Inglis* (now Lord-Advocate) for the respondents.

The Court, after hearing counsel, ordered minutes of debate.

The reclaimers (defenders) argued that the decret was valid and binding. As well might it be contended that the resignation of a judge in a law Court before whom a litigation has depended, and been in reality, although not formally concluded, either in whole or in part, renders all that has taken place null and inept, merely because his signature was not adhibited to some formal acts before he came to be divested of his judicial functions. *Smith v. M'Kay*, 27th January 1835, 13 S. 328; *Forrester v. Gourlay*, 27th March 1633, Dict. 645; *Alter v. Affleck*, March 2. 1636, Dict. 646; *Earl of Crawford v. Alexander Bruce*, Jan. 4. 1699, Dict. 649; *Colonel Erskine v. Lady Mary Cochrane*, July 30. 1714, Dict. 649; *Hamilton v. Hay*, 30th Jan. 1608, Dict. 643; *Freeland of that Ilk v. Freeland*, 28th February 1666, Dict. 646; *Pitcairn v. More*, 2d December 1680, Dict. 647; *Runciman*, 14th May 1851.

The respondents (pursuers) argued that the oversman had and could have no power to prorogate the submission, except so far as regarded the specific questions devolved upon himself. Suppose a representation against the notes had been made, and the arbiters had then come to differ in opinion on some of the points on which they had agreed, and not being able to agree, had resolved to let the submission expire by declining to prorogate, it is contrary to reason as well as the plain limitation of the oversman's powers, that he by his prorogation should have the power of keeping alive the submission which the arbiters themselves intended to drop; *Gray v. M'Nair*, 5 W. and S. 305.

The case was advised on 10th March 1851.

THE LORD PRESIDENT (Boyle) was of opinion that the devolution on the oversman did not enable him by his own act of prorogation to keep the general submission in existence when not duly prorogated by the arbiters themselves; but that under the authority of the decisions, and the admitted state of the facts, the decree arbitral that was formally completed in strict conformity with the notes which had been duly subscribed, while the submission validly subsisted, could not be set aside.

LORD FULLERTON was also of opinion that the decree was good, but on different grounds. He founded on the prorogation of the submission by the oversman. No doubt the old decisions do afford countenance to the proposition maintained by the defender, and adopted by the Lord President, that the informal expression of the opinion of arbiters authenticated by writing during the dependence of the submission, may be competently reduced into the form of a regular decret arbitral after the submission has expired. But the force of these old decisions has been destroyed by later cases, and especially that of *Runciman*, 14th May 1851. Some of them were prior in date to the act 1681, and all of them were pronounced before it was finally determined that no de-

Nov. 23. 1852. *Langs v. Brown.* decreet arbitral was valid, unless executed and attested with all the formalities of the statute. Some of those later cases, and in particular that of *Runciman*, were reductions, and the result was the declaration of the absolute nullity of the informal notes. But if these notes were a nullity as expressive of any binding expression of the opinions of the arbiters, he did not see how a nullity could be reared up into a reality by any act of the arbiters, done after their powers had expired. According to any other view any informal decreet arbitral, pronounced during the dependence of a submission, would admit of being rectified and amended at any given time by the arbiters. But the doubt he had was on the other point, whether the Court was compelled to hold that at the date of the decreet-arbitral the submission had expired, or whether it was not validly prorogated to the end of enabling the arbiters in May 1847, to authenticate in due form the opinion expressed in the notes of the 10th November preceding. This raised the question as to the extent of the power of the oversman to prorogate. It would be incompetent for arbiters to remit part of a case to an oversman, whilst they retained certain other points of it for their own decision. To support the appointment of the oversman in relation to the points in which they differ, there must be a final and irrevocable determination of the points in which they agree. But the inference from this is that the signed notes of the 10th November, did become on being made the ground of the appointment of the oversman, the irrevocable expression of the opinion of the arbiters on the matter contained in them. They did not constitute a decreet-arbitral, nor could they be rendered so if the submission was allowed to expire. That is fixed by the decision in the case of *Runciman* and the others referred to. But these notes must be held to have exhausted the judicial powers of the arbiters, and to have confined any decreet-arbitral to be pronounced while the submission continued in force, to the formal repetition and authentication of the determination contained in the notes. Again it is fixed by the decision in the case of *Runciman*, that the validity of the appointment of the oversman, and of any decreet-arbitral to be pronounced on the matter devolved on him, depended on the validity of the decreet-arbitral pronounced by the arbiters, so that in the circumstances of the case, the prorogation of the submission was indispensable for the valid exercise of the powers which had been devolved on the oversman, because it was indispensable in order to enable the original arbiters to embody the notes of their opinion on the points in which they agreed in that authentic form, without which any decreet pronounced by the oversman on the points devolved on him, would, according to the decision of the case of *Runciman*, have been a nullity. He could see no violation of principle in holding that the prorogation of the submission validly prorogated the whole submission, at least to the effect of enabling the original arbiters to give out a formal decreet in terms of their signed notes of opinion. The submission is in its nature a unity, and accordingly so it was found in the case of *Runciman*. If prorogated it all, it must be held to be prorogated in whole, and consequently, the prorogation by the oversman appeared to him to be quite sufficient for the only purpose which in regard to the original arbiters was requisite, that of enabling them to execute a regular decreet on the points in which they were agreed.

LORD CUNINGHAME agreed with the Lord President, that the decree-arbitral would have been effectual in respect of the special and final judgment or minute of the arbiters, recorded in the proceedings by the clerk of the submission, during its admitted subsistence, and subscribed by both arbiters, but differed as to the validity of the prorogation by the oversman, to preserve the submission alive and in force. He conceived that that *quasi ministerial* act was validly executed by him as a party then sufficiently empowered to do so. In every case of this description it is self-evident that when a devolution to an oversman becomes necessary, the power of prorogation must be either in the arbiters, or in the oversman according to law, or in terms of the powers in the submission when explicit, and the question is; In which of these parties does it lie here? It must be in the oversman, as the arbiters in reality as well as *ex figura verborum* have devolved the future procedure in the submission on the oversman, *with all the powers competent to the office*. One of these powers is that of *prorogation*. This (holding the devolution valid) is not so much a judicial as a *ministerial* act appropriate to the functionary, who is the only judge officiating in the latter stage, where the prolongation of the submission is necessary to give him time for farther deliberation. An opposite view would lead to inconsistent results. If it be conceded that the submission must stand on the oversman's prorogation as to the points devolved on him, it cannot fall *quoad ultra*. His prorogation would be incomplete and futile if it did not keep the whole submission in dependence, as he himself could only decide two of the remaining points referred, while the award as to the rest would fall to the ground. Surely, however, it would be an anomalous doctrine to hold that a submission may be at once subsisting *pro parte* and extinguished *pro parte*. No such doctrine can be gathered from any authority. With reference also to the particular ground assigned by the Lord President for supporting the decree, he entirely concurred. The arbiters were entitled and bound (even if the submission had been allowed to fall) to issue a formal decree-arbitral for execution, in terms of the final minutes of their decision recorded by the clerk and subscribed by themselves during the subsistence of the submission. He was of opinion that the decrees-arbitral both of arbiters and oversman, ought to be sustained. Nov. 23. 1852.
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LORD IVORY regretted that the result of his opinion would be an equal division of the Court. He was of opinion with the Lord President that the prorogation by the oversman was not sufficient to keep alive the submission, and with Lord Fullerton that without prorogation the notes of the arbiters were of no avail. The power to prorogate is incidental to and in its exercise cannot go beyond the jurisdiction given. Here that jurisdiction was limited to certain specific points, and the oversman's right to prorogate could not extend to other matters over which neither directly nor indirectly had he any power whatever. Then supposing that in this way there was no valid prorogation—so as to keep the submission alive on the points not delegated to the oversman—he was very clear that the original arbiters had no power to issue a decree-arbitral after more than year and day had elapsed from the date of their own last prorogation. On this head the authority of *Runciman's* case is conclusive; but had it not been so he should still have been prepared

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to hold that as without prorogation, the power of arbiters have no legal endurance for more than a year and day, so without prorogation the arbiters cannot perform any valid act after the lapse of that period, and *a fortiori* are powerless either to pronounce or issue a final decree. As to the previous *notes* they can neither of themselves supply the want of a decree, nor avail as a warrant for issuing such decree after the arbiter's whole powers had come to an end by the lapse of year and day. In this respect they stand much in the same situation with those *verbal acts* on the part of arbiters, to which the decisions pronounced before the Act 1681 refused all faith. Since that statute *written notes* not having the solemnities of law, are quite as improbativ and quite as much beyond the reach of being supplied by parole testimony as were the verbal proceedings prior to the statute. If the written *notes* of an arbiter improbativ in themselves, could *quandocunque* be resorted to, from which *ex intervallo*—no matter how long,—to extend a formal and probative decree, how comes it that we find so many cases in our books of *informal decrees* having been set aside? In the present case the arbiters never meant their *notes* to operate, nor did they issue them as a decree; on the contrary, they gave them out with the intent, and in the anticipation that they would be reclaimed against, in which case there must have been ulterior proceedings. No doubt failing such reclamer, the arbiters did authorise the clerk to the submission to extend a *decree*. But it was the decree so to be extended and which they meant to execute, and issue *de futuro*, to which alone they looked as the instrument which was to operate, and have effect as their *actual decree*; and had such a decree accordingly, been prepared and executed and issued within year and day of their previous prorogation of the submission, it would have been a good decree, but not having been so until year and day were more than elapsed, he was of opinion that it was bad. They had by that time no longer power to execute any decree, and therefore as the decree which they did execute was *in itself* bad for want of power, so it could not be made good by any reference back to or combination with the previous *notes*, which had not and were never to any extent intended to have such an effect.

The Court being thus equally divided in opinion, appointed the record with revised minutes of debate, and the opinion of the Judges of the Division to be laid before the Judges of the Second Division, and the permanent Lords Ordinary for their opinion.

Of the consulted Judges the Lord Justice-Clerk, Lords Robertson, Cockburn Medwyn, Rutherford and Murray, were of opinion that the prorogation was effectual to keep the submission alive, and that therefore the Lord Ordinary's interlocutor should be altered. Lords Cowan, Wood and Anderson adhered to the interlocutor.

The case was again called to-day, when

The LORD PRESIDENT announced that the majority of the Judges were in favour of the interlocutor being altered, but that the opinion of Lord Medwyn who had resigned since the opinions were delivered, could not be counted. His Lordship then proceeded to deliver his own opinion.

The LORD PRESIDENT. I concur with what appears to be the opinion of all the consulted Judges that the notes which were issued by the arbiters on

the 10th and 16th November, if they are to stand as themselves the judgment Nov. 23. 1852. and, without the prorogation, are to be regarded as the decree-arbitral, are not effectual for that purpose. That appears to me to be a settled point.

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But it is on the other parts of the case that my difficulty lies; and the conclusion I have arrived at is, that the decree-arbitral cannot be sustained. I think there has been a miscarriage in the whole matter. I do not think the notes can be taken as a decree-arbitral, and it is plain that the arbiters themselves do not so regard them, because they give the parties liberty to reclaim. Within fourteen days the parties might have reclaimed, which imports that the arbiters might have changed their opinion after farther consideration. The submission, therefore, *quoad* these matters, was not then exhausted; nay, with no reclaiming note at all, I think that if they had given instructions to the clerk to issue a decree-arbitral in terms of these notes, and if they had afterwards changed their opinion, the arbiters were entitled to call the parties again before them and change their award. Now I think they take an incompetent step altogether here. Upon the 10th and 16th November, before the fourteen days are out, while their notes are not final, and therefore, while they have not decided anything in the submission, they make a minute of devolution on an oversman on the narrative that they had decided the other points of the case. If they had so decided, that would have been a final decision; but they had not done so. What then is the position of matters? are they to tie up their hands against altering their judgment? If so, then it is a most irregular and incompetent proceeding: for after having given parties to understand that within fourteen days they might reclaim, to do anything which would thus tie up their hands was a most unjust, irregular, and iniquitous course to adopt. They might as well have issued their decree-arbitral within the fourteen days. If then their hands were not tied up to issue a decree in terms of the notes, what did they do? They devolve the duty on an oversman. Now if one part of the case was still before the arbiters when another part of it was sent before the oversman, it introduces a state of matters which, so far as I am aware, is perfectly novel and inconsistent with the nature of a submission. I think there was incompetency in attempting to transfer to the oversman the powers of prorogating that which was still before themselves. They were in error in not waiting till they had decided the points before themselves, and then making the devolution. I should be sorry to overturn a decree-arbitral which appears to be correct. But the very sacredness of our decrees-arbitral requires us to see that no informalities are introduced, and, in this view, I think there has been mismanagement here, which proves fatal to the decree.

LORDS FULLERTON, CUNINGHAME, and IVORY remained of their former opinions, LORD IVORY adopting the LORD PRESIDENT's views.

The COURT therefore "in conformity with a majority of the opinions of the whole Court, alter the interlocutor of the Lord Ordinary reclaimed against, repel the second, third, and fourth pleas in law stated for the pursuer, and decern; remit to the Lord Ordinary to proceed farther in the cause as shall be just, and reserve all questions as to expenses of process."

John Gibson, junr., W.S., Pursuers' Agent.

Murray and Beith, W.S., Defender's Agents.

(J. S. M.)

No. 23.

HAY v. SCOTT.

Pauper—Parochial Relief—Bastard. 1. Parochial relief though during temporary bad health, held sufficient to interrupt the formation of a residential settlement, under the old poor law. 2. A widow having only a derivative settlement through her late husband, had a bastard child. Held that the parish of the child's own birth, and not of its mother's derivative settlement, is bound to maintain it. 3. Relief to a mother, in form, though practically for her child rather than herself, is sufficient to prevent the acquisition of a residential settlement.

2d Division. This was an action at the instance of the inspector of the poor of the city parish of Edinburgh, against the inspector of the poor of the parish of Duddingston, for repetition of sums paid for the interim support of sundry paupers.

Nov. 23. 1852. The only cases which ultimately came to be decided by the inner house, were those of, 1st George Peebles, and, 2d, the illegitimate child of Isabella Ross or Rodgers.

1. George Peebles (his parish of birth being unknown) had acquired a residential settlement in Duddingston, by living there from 1824 to Whitsunday 1834, came to reside in Edinburgh at Whitsunday 1837, and while still there in February 1840, applied for parochial aid on the ground of bad health, and received aliment for himself, his wife, and family from the parish of Edinburgh, first, from that date to July 1843, and secondly, (having in the interval recovered his health and supported himself and family) from October 1846, to January 1848. For these advances the parish of Edinburgh claimed relief from that of Duddingston.

It appeared that a claim for repetition had been made to the parish of Duddingston on three occasions, viz., 1841, 1844, and 1846.

The Lord Ordinary decerned in favour of the defenders, and the pursuers reclaimed.

A. R. Clark, with whom T. Mackenzie, for the pursuers, maintained that with regard to the first of these periods of aliment, 1840 to 1843, a claim lay against the defenders as the parish of residential settlement, which had never been lost, as no new settlement had been acquired in Edinburgh, less than the three years required by the old act, then in operation, having elapsed before Peebles became a proper object of parochial relief.

Baillie and the Solicitor-General (Neaves), for the defenders, answered that under the old law the parish of apprehension was under no obligation to give aliment to a pauper having otherwise no claim, that they had done so, therefore, *suo periculo*, and could not be held to have trusted to making good any claim of repetition.

With regard to the second period (1846 to 1848), it was maintained that the same argument must still apply, as the pauper had not then, any more than at the previous time, acquired any settlement in Edinburgh. Answered, that under the new act which had then come into operation, the pauper had, at the time in question, lost his settlement in Duddingston, in respect that five years had elapsed since he left that parish in 1834, uninterrupted by one year's continuous residence there.

The Court unanimously sustained the claim against the defender for the first period, Lord Wood observing that any doubt he had originally enter-

tained as to the effect of the parochial relief, obtained at that time, in preventing a residential settlement from being acquired, was now entirely removed. Nov. 28. 1852.

Their Lordships unanimously held the claim for the *second* period, under *Hay v. Scott*, the present statute, excluded.

2d, The case of *Isabella Ross or Rodgers* was as follows :—

Her deceased husband, James Rodgers, was born in the parish of Duddingston, and it was denied by the pursuers that he had ever acquired any other settlement. He died in Edinburgh in the year 1841, and his widow immediately after his death received from the pursuers a small amount of relief for herself, and a child born of the marriage, repetition of which was at the time obtained from the defenders, who also advanced some trifling sums to her in the months of August, September, and October of that year.

The lawful child died, and the widow continued to reside in Edinburgh without parochial relief, down to July 1844, when she had an illegitimate child, and shortly after died. The parish of Edinburgh advanced certain sums as aliment for the illegitimate child, and a small sum to bury the mother.

Of these sums they now claimed repetition from the parish of Duddingston, as the parish of her late husband's birth-settlement, passing derivatively to her, and through her to her bastard child.

The defenders attempted, 1st, By averments which need not be given, as the point did not ultimately come to be decided, to prove, that the father had himself acquired a settlement in Edinburgh ;—2d, That the widow had acquired a settlement there for herself after his death, and contended, in the 3d place, that however these questions might be decided, the derivative settlement of the father could never pass through the mother to her illegitimate child, which must follow the *residential* settlement of the mother, or failing that, the settlement of its own birth.

The Lord Ordinary had repelled the claim of the pursuers, finding that they were liable for the support of both mother and child, in respect that the former had acquired a settlement in Edinburgh during the three years immediately succeeding her husband's death, sufficient both for herself and the illegitimate child. The trifling aliment she had received in 1841, was not, in his Lordship's opinion, sufficient to prevent this result, as, though in form for herself, it was in reality for her lawful child, then alive, and ceased with its death.

The LORD JUSTICE-CLERK observed that he could not hold that the mere derivative settlement of a wife from her husband, had all the results of a direct residential settlement. The illegitimate child of the widow was a thing altogether unconnected with, and foreign to the marriage which formed the foundation of the derivative settlement. In everything connected with such a child, the mother was to be held as unmarried, and the child must follow her. The derivative settlement was the result of the wife's sharing the husband's fate, and having her person sunk in his, and the effects of such settlement must be commensurate with its origin. The parish of the bastard's own birth, and of its mother's residence at the time, must be liable for its maintenance.

LORD COCKBURN expressed some doubts, but would not disturb the unanimity of the decision.

LORDS MURRAY and WOOD concurred.

Nov. 23. 1852. The Court therefore sustained the defences of the parish of Duddingston as regarded the claim for the child, but found that the mother had acquired
 Hay v. Scott. no settlement for herself in the parish of Edinburgh, and that the pursuer was therefore entitled to repetition by the defender of the sums advanced for her support and funeral expenses.

James Morgan, S.S.C., Pursuer's Agent.

Scott, Rymer and Scott, W.S., Defender's Agents. (W. H. T.)

No. 24.

MAGISTRATES OF PERTH v. J. & C. M'DONALD.

Petty Customs—Burgh—Sale—Bona fides.—A tax being exigible by a burgh upon all whisky "brought in by strangers,"—Held that whisky brought by a merchant of the burgh from a distiller at a distance, and brought by railway, the purchaser undertaking the risk and expense of the carriage for a large portion of the way, was truly imported by the said purchaser, and could not therefore be taxed in the character of whisky brought in by the distiller.

2d Division. This was an appeal from the judgment of the Sheriff of Perthshire to the Circuit Court, certified to the Second Division. The burgh of Perth has, in
 Nov. 23. 1852. virtue of its charter, a right to levy certain dues or petty customs upon goods entering the town. A table of these customs, framed in 1762, and engrossed
 Magistrates of Perth v. M'Donald. in the books of the burgh, contains, *inter alia*, a duty of one halfpenny per imperial gallon upon "all aqua vitæ or spirits made of malt, brought into the town by strangers."

The defenders have their place of business in Perth, but both partners live outside the burgh. In the year 1850 they ordered from Haigs and Co. distillers at Sunbury, near Edinburgh, a quantity of whisky, "to be delivered free on board at Granton, cash in eight days," after which point in the journey the defenders specially undertook the expense of transit, and all risk. It was accordingly sent, and arrived by railway, consigned to the defenders. The pursuers stated that their collectors watched the station and entrance to Perth on that night till the gates of the station were shut; that during the night, after their officers had retired, the gates were opened and the whisky was brought in and delivered to the defenders. The present action was then raised for the payment, *inter alia*, of 17s. 6d., being the petty customs said to be due upon the article, under the terms of the table or list above quoted. They alleged that the defenders were "strangers," because they personally resided out of the burgh; and that at all events the whisky must be held to be brought in by strangers, inasmuch as the real importers were the distillers in Edinburgh, and not the defenders. The expense and risk being undertaken from Granton to Perth by the defenders, they held to be a mere subterfuge for the purpose of evading the duty. Importance was also attached to the fact of the nocturnal delivery of the goods. A voluminous proof was led, most of which, however, referred to matters regarding which the parties were not at issue before the Superior Court.

The Sheriff-substitute and Sheriff both found in favour of the pursuers, mainly on the ground that the vendors and not the buyers were the real importers of the whisky, the peculiarities by which the property seemed to have passed at Granton, being a mere evasion, and that therefore it must be held

to have been brought in "by strangers." The plea that the defenders were themselves strangers, in respect of their non-residence in Perth, was, however, repelled, and did not now form part of the case in the Higher Court. Nov. 28. 1852.
Magistrates of
Perth v.
M'Donald.

C. Scott, with whom *Deas*, for the appellants and defenders, maintained that the *dominium* of the whisky having passed by delivery at Granton, the Railway Company, who were the instruments of bringing it into the town, were the servants of the defenders and not of the distillers, and that it was, therefore, not brought in by "strangers." The undertaking of the expense and risk was not an evasion, but was done *bona fide* and in the course of trade. They had a right to choose this way of bringing in their goods. As to the hour of the night at which the arrival was said to have taken place, it was entirely irrelevant.

P. Fraser, with whom *G. Patton*, for the pursuers, contended that in the voluminous proof taken in the Court below, it had been proved that all whisky brought in by public carriers from time immemorial had paid duty, whether belonging to inhabitants or not—and therefore the result of the tables, as thus interpreted by usage, was entirely in their favour, irrespective of the other peculiarities of this case.

In obedience, however, to the opinion of the Court, they were obliged to abandon this line of argument, as not being covered by their pleas in law, or raised in the record.

They then argued, that the mode of sale by which a seeming transference of property had taken place at Granton instead of Perth, was a mere attempt to evade the tax by fraudulent means, and resembled those cases in which market dues had been attempted to be evaded by persons bringing their goods to the outside of the market, and sending into the market in search of purchasers, who came out and made their bargain. In this case, Haig and Co. had an agent in Perth, who beat up for customers, and the present sale must be looked upon as one transaction, from the time of their agent securing the defenders as customers to the moment of the delivery of the whisky at the defender's cellars in Perth. Haig and Co., who were strangers, must therefore be considered the real importers. Moreover, the transaction by which the property was said to have passed was shewn to be unreal, by the fact that one of its conditions, viz. payment by cash, had not been adhered to, for it was proved that the payment actually took place by bill.

The COURT unanimously found, that under the action as framed, only two questions were open, viz. 1st, The question of the defenders being "strangers," in respect of their personal residence out of burgh; 2d, The question of who were the real importers of the whisky. The first of these had already been decided in favour of the defenders, in the Inferior Court. In regard to the second, which had been decided in favour of the pursuers, they altered the Sheriff's interlocutor, and found that the defenders did really and truly import the whisky at their own expense and risk, and assoilzied them from the conclusions of the action.

Hill and Robertson, W.S., Pursuers' Agents.

Murray and Beith, W.S., Defenders' Agents.

(W. H. T.)

No. 25.

MACKENZIE v. CAMERON.

Process—Expenses—Conjunct Liability.—Where an action is brought against several defenders, concluding against them conjunctly for expenses, decree in absence against any one of them entitles the pursuer to decree for the full amount of the taxed expenses against such defender, and not merely for a proportional share of the expenses incurred down to the date of enrolment for decree.

1st Division.

Nov. 24. 1852.

Mackenzie v.
Cameron.

This case was reported verbally by Lord Anderson, as involving a matter of considerable importance in practice. An action of damages was raised against three defenders, and concluding against them conjunctly for expenses. Defences were lodged for two of these parties, which have not yet been disposed of; no defences were lodged for the third. Against this third party therefore the pursuer obtained decree in absence with expenses, and then in the usual form, the case was remitted to the auditor to tax the expenses as against him. When the case came before the auditor, he taxed the account, but he added a note to the effect that, "according to usual practice, he has only allowed one third of the expenses incurred down to the date of enrolment for decree," as against him, because the case is in progress as against the other two defenders, and also that "it may be necessary to reserve the pursuer's right to demand decree for the other two thirds against the remaining defenders as conjunctly and severally liable for the same in the event of their being unsuccessful, and subjected in the expenses of process." In that way there being no proper contradictor, it appeared to his Lordship that it was rather for the Court to dispose of the case than for him.

Monro for the pursuer. If we deviate from the ordinary principle, that where several parties are liable by law jointly for the whole sum, we would get involved in intricate calculations. It comes to this, that a party in the position of my client, who has a number of persons conjunctly liable to him in law, would be worse off than if he had only one; for, having got his share of the expenses from one, he could not come back on him for the rest, or any other part of the expenses, and the possibility may be that some of the other defenders are bankrupt and unable to pay their several proportions. *Hughes and Duncan v. Gordon*, 2 S. 498; *Magistrates of Campbelltown v. Galbraith*, 5th June 1845, 7 D. 828; *Paterson v. Murray*, 6 S. 478.

Patton, contra.

The LORD PRESIDENT. It rather appears to me that the way to deal with this case is, that the party who has made no appearance is the party against whom the pursuer was entitled to judgment, and that for expenses in the same way as if no other defenders had been conjoined with him in the action. But so far as any expenses are incurred by the other parties in the action, that party is not to bear any part of such expense.

LORDS FULLERTON and CUNINGHAME agreed.

LORD IVORY. I am of the same opinion. If none of the three parties had appeared in this case, the decree would have been for expenses jointly against them all. That, therefore, is the measure of the expenses to which this party

is liable by the ordinary rules of process. The case still depends, and the other parties may or may not be liable in expenses, but the ground on which his liability rests is a joint and several liability.

Nov. 24. 1852.
Mackenzie v.
Cameron.

The Lord Ordinary "Finds, in conformity with the opinions of the Judges of the First Division of the Court, that the pursuer in a question with the defender Cameron is entitled to decree for the full amount of his taxed account, reserving to the said John Cameron his claim of relief against the others, defenders, in the event of their ultimately being found liable in expenses."

J. P. Scotland, W.S., Pursuer's Agent.

(J. S. M.)

J. and E. PADGETT and Co., v. MACNAIR and BRAND.

No. 26.

Sale—Retention.—Held, That a buyer who rejects goods sent to him, as being disconform to sample, is bound to return them immediately, if it can be done without injury to the goods, or to pay the price, and has no right to retain them in security of his claim of damages for non-implement of contract.

This was an action for the price of a parcel of shawls sent to the defenders by the pursuers, in obedience to an order. The defenders refused payment on the allegation that the goods were disconform to sample, but also refused to return them, until either a parcel of shawls of the kind bargained for should be sent, or damages for non-implement of contract should be paid.

2d Division.
Nov. 24. 1852.
Padgett & Co.
v. Macnair, &c.

The pursuers denied that the shawls were disconform to sample, but maintained, that if the defenders were not satisfied with them, they ought to have immediately sent them back, having failed to do which, they had now no alternative but to pay the price.

The parties not being quite agreed upon certain details of fact, in particular as to what sample had formed the ground of the contract, the Lord Ordinary had ordered issues, which being reported to the Court, the pursuers maintained that no issues were necessary, as, upon the admissions of the defenders, they were entitled to decree for the price.

The Court then remitted to the Lord Ordinary to hear and pronounce a judgment upon this question. He pronounced the interlocutor now reclaimed against, which was to the effect, that the facts and circumstances proved by admission or by the letters produced, did not afford sufficient grounds for decerniture.

Cook, with whom *T. Mackenzie*, appeared for the pursuers.

J. Donaldson, for the defenders.

The Court unanimously found in favour of the pursuers, for the price of the goods; the LORD JUSTICE-CLERK observing, that there was here no room for issues or any further investigation. It was sufficiently proved that the goods were sent to the defenders in obedience to order, and by a regular invoice. If the buyers did not think them conform to sample, they had on their part the right to return them, but the reciprocal rights of the seller made it incumbent on them to do so immediately. There might be goods of such a nature that they could not be returned without injury, or could not be returned

Nov. 24. 1852. at all ; in such cases it might become the duty of the dissatisfied buyer to keep them in trust for the seller, and dispose of them as his agent, after giving im-
 Padgett & Co. mediate notice of his rejection of them. There was, however, no trace in the
 v. Macnair, &c. law of Scotland, or that of England, (which, in a purely mercantile question like this, must be looked to,) of any such right of retention as that here asserted. (See Smith's Compendium of Mercantile Law.) Were such a doctrine held, there would be no safety for sellers.

W. and J. Cook, W.S., Pursuers' Agents.

W. Miller, S.S.C., Defenders' Agent.

(W. H. T.)

No. 27.

ABERDEEN HARBOUR COMMISSIONERS v. ABERDEEN RAILWAY Co. and W. ALLARDICE.

Issue.—Words struck out of issue, as involving a question of law, as superfluous, and as leading to irrelevant questions.

2d Division.

Nov. 24. 1852.

Aberdeen Harbour Commissioners v. Aberdeen Railway Co., &c.

This case, which referred to prescriptive possession of a piece of ground, came before the Court upon a report upon issues. The pursuers proposed the following issue :—

“Whether for time immemorial, or for forty years and upwards prior to 1849, or prior to the construction of the said embankment,” (alluded to in the admission) “the said stripe of ground was possessed and used as part of the harbour of Aberdeen, or of the alveus adjacent to the same?”

The defenders proposed, “whether the pursuers and their predecessors and authors, in virtue of their rights and titles to the harbour of Aberdeen, produced in process, have, for time immemorial, or for forty years prior to 1849, enjoyed exclusive possession of the said stripe or piece of ground as part of the said harbour?”

The COURT struck out the words used in the issue proposed by the defender “*in virtue of their rights and titles to the harbour of Aberdeen, produced in process,*” as involving a question of law, not of fact. Also the words “*for time immemorial*” as superfluous. Also the word “*exclusive*” as throwing open irrelevant questions of accidental and exceptional use by trespassers.

Cook for Pursuers.

Deas for Railway Company.

Hector for Allardyce.

Barron and Hagart, W.S., Pursuers' Agents.

James Ross, S.S.C., *Jopp and Johnston*, W.S., Agents for Defenders. (W. H. T.)

No. 28. **JOHN JOHNSTON, Suspender, v. CLIFTONHILL COAL COMPANY, Chargers.**

Bill—Acceptor—Designation.—A note of suspension of a charge on a bill refused, which proceeded on an alleged discrepancy between the address to the acceptors by the drawer, and their signature in accepting the bill.

2d Division.

Nov. 24. 1852.

Johnston v. Cliftonhill Coal Co.

The suspender had been incarcerated at the instance of the chargers, who were indorsees of a bill drawn by him upon, and accepted by Messrs John and Dugald M'Arthur, and protested for non-payment. The acceptors being bankrupt, summary diligence was used by the indorsees against the drawer.

Johnston presented a note of suspension and liberation, without offering Nov. 24. 1852. caution, which was refused by the Lord Ordinary on the bills.

The suspender reclaimed, on the ground that the bill was irregular. It Johnston v. Cliftonhill Coal Co. was addressed, he contended, to the company firm, "Messrs J. and D. M'Arthur, Fishcurers, 25 East Howard Street, Glasgow," but was accepted by them in their individual capacity, "John M'Arthur, and Dugald M'Arthur." No doubt these two persons formed the whole partners of the said firm, but this was accidental, and they ought to have accepted it in the character in which it was addressed to them, so as to make it a company debt.

J. Adam,—Deas, for suspender,

Logan,—Solicitor-General, (Neaves) for respondents.

The COURT unanimously refused the note, not merely in respect of no caution being offered, but because they held the suspender barred by something of the nature of a personal exception, from objecting to the mode in which the bill was accepted. He had indorsed it to the chargers himself, as a valid document; and even assuming that he had done so prior to its being accepted, he had addressed it vaguely, taking his chance of their accepting it either in their individual or their corporate capacity.

Adam and Kirk, W.S., Suspender's Agents.

D. J. Macbrair, S.S.C. Respondents' Agent.

(W. H. T.)

SCOTLAND v. LEITH DOCK COMMISSIONERS.

No. 29.

Poor's Assessment—Harbour Revenue.—Held that the revenue of the harbour of Leith is not assessable for poor's rates, with the exception of a sum payable to the Queen's Remembrancer for behoof of the ministers of Edinburgh, and for other municipal purposes.

This was an action brought by the Inspector of the Parochial Board of 1st Division. North Leith against the Commissioners for the Leith Docks and Harbour, to enforce payment of certain assessments imposed for the year 1846-7, under Nov. 25. 1852. the Poor Law Act, 8 and 9 Victoria, c. 83, on the wet-docks, quays, and wharfs, and on the ship-building and other yards, graving docks, and premises owned and occupied or tenanted by the defenders within the parish.

Certain ancient grants and acts conferred upon the Corporation of the City of Edinburgh the right of levying harbour and shore dues at the port of Leith. The Act 1661, c. 8, conferred upon the Magistrates of Edinburgh, for the maintenance of the city clergy, a grant of a merk per ton on all goods imported, not the growth of Scotland. Various legislative enactments were passed in the course of the last and the present century for the purpose of improving the docks and harbour of Leith. Under the 39th Geo. III., c. 44, operations on a large scale were carried into effect, and a debt incurred on the security of the harbour and dock dues amounting to £265,000. This sum had been advanced by the Lords of the Treasury; and under the 7th Geo. IV. c. 105, an arrangement was entered into with the Treasury, by which the whole management of the docks and harbour was transferred from the Corporation of Edinburgh to a commission; at the same time the whole revenues of the harbour and docks were assigned to the Lords of the Treasury, in security of the sums advanced.

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Nov. 25. 1852. By the 39th Geo. III. c. 144, the magistrates were authorised to borrow money, to enable them to complete the operations of the statute, and empowered to levy certain rates therein specified, in respect of all vessels brought into or using the harbour. The statute provides a sinking fund for the gradual extinction of the debt thus created; and further provides, that the whole revenues arising from areas, either in feus or yearly rents, shall be brought into the dock account, until the debt should be so extinguished. The magistrates, and subsequently the commissioners, were also entitled under the 47th Geo. III. c. 3, to levy certain amount of pontage or tonnage duty on goods imported, for the purpose of making and maintaining drawbridge, &c., also dues on vessels for the use of the dry docks.

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Commissioners.

In 1830, an action was issued by the heritors of the parish of North Leith against the magistrates of Edinburgh, to have it found that they were liable to be assessed for the support of the poor on an alleged rental of £7000, derived from duties and exactions leviable on the poor. In this action, the Leith Dock Commissioners, appointed under the 7th Geo. IV. c. 105, and the ministers of Edinburgh, were made parties, and appeared. The ministers were assailed, and the Lord Ordinary (Mackenzie) pronounced an interlocutor finding that the dues so levied "are not liable in whole or in part to be taxed for the relief of the poor of the parish of North Leith, in so far as the same have been applied or made applicable to the payment of the expense of keeping up or improving the said port or harbour," that the duties were so applicable, and that the feu-duties were not liable, in respect the subjects themselves were liable to be taxed fully without deduction of the feu-duties, and therefore assailing the defenders. The heritors acquiesced in this interlocutor, which, accordingly, became final, on the magistrates of Edinburgh agreeing to pay the assessment, in respect of certain portions of land alleged to be held by them as ordinary property.

Subsequently to this decision, and in the year 1833, the town of Edinburgh became insolvent, and the affairs of the city were ultimately arranged by the 1 and 2 Victoria, c. 55, (July 1838) commonly called the City Agreement Act. By this statute the preferable right in security held by the Treasury, is postponed to the annual payment of £7680, payable to the queen's remembrancer in exchequer, and allocated to the ministers of Edinburgh, to the creditors of the city, and to its college and schools, proportionally, in sums of £2000, £3180, and £2500, respectively. The impost for behoof of the ministers of a merk per ton on goods imported was abolished. The act farther provides that the debt to the Treasury might be postponed to a farther sum of £125,000 to be expended on additional improvements.

By the 7th Vict. c. 20, the Commissioners for the harbour and docks of Leith were incorporated, and it was declared that the whole property vested in them should be held for the use of the said harbour and docks of Leith, but for no other use or purpose. The receipts of the commissioners having for some years exceeded the expenditure, a considerable fund had accumulated, and had been deposited in bank, in order that it might be applied to the execution of the further works contemplated on the harbour. Accordingly, the recent act of the 10th and 11th Victoria, c. 114, was passed, by which, *inter alia*, these surplus funds were appropriated, and the defenders, at the date of

the raising of the action, on the faith of that statute, had already entered into Nov. 25. 1852.
contracts by which they were under obligations to pay within three years, from
March 1848, about £140,000, for improvements on the harbour, and their
statement—admitted by the pursuer—was, that all the overplus revenue would
for many years be absorbed in these works.

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Under these circumstances, the defenders were served with notices for payment of poor rates in October 1846 to the amount of £861, on a rental of £22,971, derived from the docks and harbour, and £28, 15s. 3d. on a rental of £767, derived from yards and docks.

An action having been brought to enforce this demand, a record was made up and closed; and after debate, the Lord Ordinary (Cuninghame) ordered cases to be prepared "in respect of the general nature of the question on which the determination of the present case depends."

The pursuer argued that the statutes founded on by the defenders contained no exemption of the revenues from the burden of poors' rates, and that, therefore, the appropriation of such revenues to special objects authorised by the statute, could only import an appropriation of them after the deduction of such public burdens,—that, at any rate, they are assessable so far as applied to other purposes, such as the payment of the city clergy, &c., and so far as there is any surplus after defraying the ordinary expenses and repairs of the harbour,—that all property for which the defenders draw a rent, and adjacent to the docks, such as warehouses, yards, and the like, are assessable, and that the circumstance of buildings, docks, &c., being erected within high-water mark, will not exempt the owners from assessment. They also pleaded that the judgment in the former action did not constitute *res judicata* as to this case.

In Scotland, beneficial occupation is not the element that regulates the assessment. *Barrack Commissioners v. Milroy*, 21st November 1815; *Officers of the Ordnance v. the Heritors of North Leith*, 14th June 1825, and 14th February 1829. Nor will the plea avail that the fruits or revenues are applied to the public debt, and in the construction of the works. The value of a subject is not swallowed up, because the annual return from it may go to liquidate the debt by which it was acquired or created. If this principle were adopted, there would be an end in most cases to any assessment whatever. *The Queen v. Sterry*, 12, Adolphus and Ellis, pp. 80–92; *the Queen v. the Baptist Missionary Society*, English Jurist, v. 12 p. 748; *the King v. Agar*, 7 Barn. and Cress. p. 70.

The defenders argued that the principle of beneficial occupation being the rule of liability is one very clearly established in our own law. *The Bakers' Society of Paisley*, 6th December 1836, 15 S. p. 200. The property in the present case is not Crown property, but property vested in a trust for the public, and acquired by the present holders under a title which prevents its being applied to any thing but public objects. *The King v. the Inhabitants of Liverpool*, 7 B. and C. p. 61; *Rex. v. the Commissioners of Salter's Load Sluice*, 4 Term Rep. 730; *The King v. Terrot*, 3 East, p. 506; *Rowls v. Gells*, 2 Cowper, 451.

The LORD ORDINARY made great avizandum with the cause; and on 14th December 1850, "The Lords, on the report of Lord Dundrennan, having con-

Nov. 25. 1852. sidered the revised cases and record, and having heard the counsel for the parties—appoint the revised cases and record to be laid before the Judges of the Second Division, and the permanent Lords Ordinary for their opinion.”

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Farther argument at the Bar was considered necessary.

At the hearing, the LORD JUSTICE-CLERK expressed an opinion, to the effect that intimation of the question now specially and separately raised as to the assessment proposed to be charged on the sum of £7680, which the Commissioners have to pay to certain parties, under the Acts of Parliament which vest in them the revenues of the docks, ought to be made to those parties as directly, and it may be the only parties interested in that question.

A majority of their Lordships, however, did not consider it necessary that these parties should be called.

On the merits, the LORD JUSTICE-CLERK, LORDS WOOD, COCKBURN, and MEDWYN, were of opinion that the revenue from the docks, apart from the sum of £7680, is entirely, and in every event, appropriated to specific public purposes by the statute, and is not liable to assessment under the late Poor Law Act, that there is no room for imposing on the general portion of the funds so appropriated, any burdens or charges whatever, in respect of the payment of £7680 to be paid into the Exchequer, so as to diminish and subtract from the general funds more than £7680, that specific sum being all that can be paid on that head out of the general revenues: and, therefore, that as any assessment to which the sum of £7680 may be subjected, must, if leviable at all, be absolutely and without relief a burden upon it, the sum of £7680 is not liable to assessment for the poor in the hands of the Commissioners, by whom it must, under the provisions of a public statute, be paid in full, without any abatement, into the Exchequer, for the purposes and in the manner thereby appointed.

LORD RUTHERFURD was of opinion that in so far as the revenues of the Port and Docks of Leith are applied to the maintenance or improvement of the Harbour, there is a clear reason of exemption upon the ground referred to in Lord Mackenzie's judgment in the case between the Heritors of North Leith and the Magistrates of Edinburgh. To that extent the revenue can hardly be considered as excrescent or even existing—being consumed, as it were, in its very source. This ground of exemption clearly applies to the *free* revenue appropriated to payment of the interest and principal of the Government debt, but it stops there: and exemption, if it be claimed for the part of the revenue which is not so appropriated, must rest upon some other ground; and that other ground must be found in the nature of the revenue itself—in the character of the party to whom it belongs—or in the authority by which it is appropriated. No satisfactory ground has been stated in respect of the character of the revenue, its origin, or source. Suppose the Corporation, who were the Crown grantees of the port, had been also, under statute, the grantees of the docks, and as such had right to the dock dues, and that there had arisen a large excrescent revenue after payment of the debt and the ordinary expenses of repair and maintenance, upon what ground could it have been maintained, that, because the revenue arose from a grant of port and dock and harbour dues and dock dues, it was not assessable for the poor-rates? If the origin and source then, of the revenue, give no ground of exemption, is it to be found in the cha-

racter of the parties, who—either as trustees or beneficiaries—receive it? In Nov. 25. 1852. this case, it would appear not. Certainly, if the town of Edinburgh had remained the sole grantee, it would have been no answer that a large excrescent revenue was devoted to municipal purposes, and to the exclusion in any case of what might be considered as direct and individual advantage. That the Corporation would have been liable if they had drawn the £7680 generally for municipal purposes, seems, so far as we have yet gone, sufficiently clear. This view is not without importance in considering the case with reference to the more special objects of the appropriation, which, to a very great extent, is directly for the benefit of the Corporation. It bears upon another point stated in defence, that the statutory purposes are public purposes. But so are all municipal purposes. There have been many cases in which exemption was claimed for property held by the Crown. But such exemption never has been put or allowed, on the broad ground that the property or its proceeds were held and employed for public use, even where, by the settlement of the civil list, the revenue arising from the estates of the Crown went to the public Exchequer. The exemption was put on the character of the party to whom the revenue belonged; and ultimately Crown property and revenues have been exempted, not because of the purpose to which they were applied, but because the Crown was the real holder and proprietor on the one hand, and was subject to no taxes, except specially imposed, on the other. In like manner, there is nothing in the character of the Commissioners to exempt the funds in their hands. They are at the best but grantees of the harbour, and, if they cannot plead upon the nature of the fund—or its particular appropriation—or the privilege of the parties for whom they hold—no ground of exemption can be made out in respect of their being the immediate recipients of the fund. Then look more minutely to the beneficiaries and to the nature of the application; and take the sum of L.3180, payable annually to the creditors, What is the specific purpose to which it is to be applied? Certainly not any harbour purpose, but the payment of the city debt, as forming generally a part of the fund out of which the bondholders—the city creditors—were to be paid. To the extent in question, the city creditors appear to be precisely in the situation of preferable bondholders over the harbour revenues, but for debt not connected specially with the harbour, but merged in the general debt of the city. Another portion of the sum is L.2500, payable for the maintenance and support of the Schools and College of the city. Why should revenues belonging to the Incorporation, as Heritors of North Leith, be exempt from local assessment? The harbour has nothing to do with this appropriation—derives no benefit from it. Nor is the parish of North Leith bound to, or concerned, or interested in, the maintenance of the Edinburgh University and Schools. The maintenance of the University and Schools form a purpose to which the revenues of the Corporation were primarily applicable, but not the harbour revenue more than the other revenues; and if the Crown postponed the security to enable the Corporation to fulfil those purposes, by applying otherwise than for the benefit of the harbour, a part of the harbour revenue, that just placed the fund in a situation to which exemption did not apply, and left it liable to local taxation, like any other part of the Corporation revenue derivable from property in that parish. Another portion of the sum allocated to

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sioners.

Nov. 25. 1852. the ministers of Edinburgh, stands in a different position, and the specialty was much relied on. It has been argued, that the grant of L.2000—coming in place of the merk *per ton*, which was not assessable for the poor-rate—should also be free from assessment. This argument, though plausible, seems by no means conclusive. The original fund may have been free from the assessment: the substituted fund may be subject: and the liability for assessment may have been taken into view when the arrangement was made, and by whomsoever the assessment may have been payable. If the Town of Edinburgh had remained in solvent circumstances, and—in respect of the ministers resigning the merk *per ton*—had granted an heritable security over the property of the Incorporation in North Leith, or over the excrescent revenue from the port and docks, the new source of payment would not have carried the privilege of that which was abandoned, but the substituted fund would have been subject to its own liabilities, without reference to the liabilities of that for which it was the surrogate. There seems nothing here but a change of liability, necessarily arising from the change of investment, or, as in many other cases, from the change of the hands in which the property is held. On the whole, therefore, he was inclined to take the broad view, that all those different parties, for their respective rights and interests, are in the situation simply of preferable creditors or bond-holders over the dock and harbour dues, and that—as they are creditors, not for dock or harbour debts, and as the dock revenues appropriated to their payment have no exemption, as being applied to dock and harbour purposes—the parish of North Leith is entitled to assess the Commissioners to the extent of that portion of their revenue. He was therefore of opinion that the defenders, the dock commissioners, are liable to assessment in respect of the sum of L.7680, and that to that extent their defences must be repelled, and decree pronounced in favour of the pursuer.

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LORDS MURRAY and COWAN concurred generally in Lord Rutherford's opinion. To-day the case was again called, when,

The LORD PRESIDENT announced that the opinions of the consulted Judges had now been received, but that the opinion of Lord Medwyn, who had since resigned, could not be counted. His Lordship stated that with regard to the merits of the case, it was unnecessary for him to detain the Court, as his views were those expressed in the opinion of Lord Rutherford.

LORD FULLERTON. I agree in thinking that Lord Rutherford's opinion must be adopted, but I confess I cannot see any distinction in principle between the £7680, and the whole revenue of the trust fund. The majority of the Court entertain different views from me; but I so far agree with Lord Rutherford and your Lordship as to that particular sum.

LORD CUNINGHAME. I coincide in the views of the Lord Justice-Clerk, and of the Judges who agree with his Lordship; and am of opinion that no assessment for the poor is leviable from the preferable sums payable to the Corporation of Edinburgh for the purposes prescribed by statute. It has been argued that these payments should be assessed for poor's rates, as income derived from lands and heritages; but I think that the usage and law of assessments for the poor do not apply to such payments as those in question. Such assessment appears to be no more authorised on the restricted preferable claims

given to the city of Edinburgh by statute, than poor's rates are claimable in other cases from real creditors. Such creditors draw their respective annual payments in full, without being chargeable with any assessment for poor, except, perhaps, on their means, in the parish of their residence. In general, poor's rates, if exigible to any extent, must be drawn from the reversion of the crop; and though that has been exempted on special grounds in the present instance, by judgments now final, that consideration cannot render preferable assignees liable for a rate not chargeable in the ordinary case against similar incumbrances.

LORD IVORY. I concur in, and entirely adopt the opinion of Lord Rutherford.

The following interlocutor was pronounced:—

The LORDS having resumed consideration of the cause, with the opinions of the consulted Judges, in consequence of the titles of 14th December 1850, and of June last, Find that the sum of L.7680, appointed by the Act 1 and 2 Vict., c. 55, § 17, to be paid annually out of the revenues of the harbour and docks of Leith, with an account in bank in the names of H. M. Remembrancer of the Court of Exchequer in Scotland, and Auditor of the said Court, for the time being, to be applied towards payment, or for behoof of the ministers of the city of Edinburgh, the creditors of the said city, and the college and schools thereof, in manner mentioned in said Act, is liable to be assessed for the poor under the Act 8 and 9 Vict., c. 83, and that in the hands of the defenders, and to that extent repel the third plea in law stated for the defender, but, *quoad ultra*, sustain the same. Find that for the year libelled, viz., from Whitsunday 1846 to Whitsunday 1847, the assessment on the said sum, deducting one-fifth in respect of ownership, which was at the rate of 1s. 6d. per pound, amounts to L.518, 8s., for which decern against the defender, with the legal interest thereof, from and after the term of Martinmas 1846, when the same became due. Find and declare, that the defenders, and their successors in office, are liable to pay poor's rates on the said sum of L.7680, from the said term of Whitsunday 1847, and in all time thereafter, but reserving to the defenders all competent relief against the recipients or others interested in the said sum of L.7680, as also, reserving to the defenders their relief against the pursuers to the extent of the assessment, or such portion of the said sum, if any, as may be found to be assessable to the parish of South Leith. Finds no expenses due to either party."

William Lorimer, S.S.C., Pursuer's Agent.

John Phin, S.S.C., Defenders' Agent.

(J. S. M.)

ANDREW GIBSON AND OTHERS AGAINST WILLIAM EWAN.

No. 30.

Proof.—Circumstances in which probation not held to have been renounced.

In this action, which was one of count and reckoning for intromission with the funds of a deceased testator, of whom the pursuers were residuary legatees, the Lord Ordinary, before answer as to the defender's liability to account for any of his alleged intromissions, remitted to an accountant to enquire into and report upon the alleged intromissions, stating at the same time any points of law which might appear to him to be necessary to determine before

Nov. 25. 1852.
Scotland v.
Leith Dock
Commis-
sioners.

1st Division.
Nov. 25. 1852.
Gibson, &c. v.
Ewan.

Nov. 25. 1852. an account could be finally adjusted between the parties, and he granted diligence against havers for recovery of all such documents as might be deemed requisite. The record was thereafter closed. Subsequently, another remit, was "with a view of finally disposing of the case," made to the accountant on a separate point as to the carrying off of furniture, &c., from deceased's house, by the defenders, and diligence granted against witnesses and havers. Afterwards his Lordship, in respect the parties had failed to avail themselves of the second remit, recalled it, and appointed the case to be discussed on the original report, and writs of objections to be lodged. After hearing parties on these objections, the Lord Ordinary pronounced an interlocutor, allowing the accountant's reports so far as favourable to the pursuers, sustaining it *quoad ultra*, and assailing the defender with expenses.

Gibson, &c. v. Ewan.

The pursuers reclaimed.

Scott and the Solicitor-General for the reclaimers, asked to be allowed a proof *prout de jure*. They had not renounced probation, and a proof *scripto* was of little use in an action which was mainly grounded on the averment that the defender had removed or destroyed the deceased's books and vouchers.

Patton in reply.

The Lords held that, in the circumstances, the pursuers could not be held to have renounced probation, and appointed them, before answer, to give in a minute, stating what they alleged and offered to prove.

James Bayne, SS C., Pursuers' Agent.

Bridges and M'Queen, W.S., Defender's Agents. (J. S. M.)

No. 31. P. THOMSON (Clerk to the Cleugh Road Trustees), v. THE MONKLAND RAILWAY COMPANY & J. WILSON OF DUNDYVAN.

Contract—Evidence.—In construing an agreement between a railway company and road trustees, the Court refused to look at letters or documents other than the original minute of agreement itself.

2d Division.

The only point of importance in this case was as follows. The action proceeded upon an agreement entered into in 1846 between the defender, Mr Wilson, as authorised by the provisional committee of a railway (afterwards amalgamated with others into the Monkland Railways Company) and the pursuers, the Cleugh Road Trustees, which agreement was minuted at a meeting of the latter, and signed by Mr Wilson and the trustees.

Thomson v. Monkland Railway Co., &c.

The parties were now at issue as to what the parties had really undertaken in the agreement.

D. Mackenzie, for the defenders, supported their view of the agreement by a variety of letters and other evidence apart from the minute of agreement itself, and as also by the usual practice in such contracts between railway companies and road trustees, but, *inter alia*,

The Court unanimously held, that it was impossible for them to look to any letters or other documents as modifying the terms of the minute of agreement.

Tod and Romanes, W.S., Pursuers' Agents.

W. A. G. and R. Ellis, W.S., Agents for Railway Company.

Walker and Melville, W.S., Agents for Mr Wilson. (W. H. T.)

LOGAN v. GIBSON AND KENNEDY.

No. 32.

Process—Expenses.—In a cause where there were two defenders, one cited as principal debtor, and the other as cautioner, and where the action was, of consent, sisted against the latter, on the case being sent to a jury, the pursuer, who obtained decree against both defenders, jointly and severally, on the merits, found entitled to expenses, *generally*, against the principal, and against the cautioner only in so far as occasioned by his appearance and pleading in the cause.

This was an action at the instance of the pursuer, an out-going tenant, for ^{2d Division.} the value of crop left on the farm, against Gibson, the in-coming tenant, as principal, and Kennedy, the landlord, as cautioner. The action originated in ^{Nov. 25. 1852.} the Sheriff Court of Ayrshire, and was advocated by the pursuer. It ultimately came to a jury trial in which the pursuer was successful. The de- ^{Logan v.} fenders had made up separate records in the Inferior Court, and both con- ^{Gibson and} tinued to defend the action up to the point of its being determined to send it to a jury. The defender, Kennedy, then suggested that the action need not be farther insisted in against him, as he was not the principal, but only a cautioner. To this the pursuer acceded, and the action was sisted as against him. The pursuer had formerly obtained application of the verdict, and expenses of the trial, against the principal defenders.

Craufurd, with whom *Deas*, now moved to apply the verdict against the cautioner, and for expenses jointly and severally against both defenders. Kennedy had made up a separate record and defended the cause up to the trial, and though the action was sisted as against him after that time, his former agents and counsel had acted at the trial for the other defender, and he must be held as being practically a party to the cause up to the last. Gibson might turn out insolvent, and it would not do for Kennedy to shelter himself behind a man of straw, in a trial which was really as much for his benefit as for that of the other.

H. Robertson, for Kennedy, observed that the pursuer himself had agreed to sist the action as against his client.

J. Adam appeared for the defender, Gibson.

The LORD JUSTICE-CLERK remarked, that Kennedy had, in his record, made himself a party to Gibson's statement, which was a question of fraud, which he ought to have known nothing about.

The COURT, after decerning against the defender Kennedy, jointly and severally, on the merits, found "the pursuer entitled to the expenses incurred by him in the cause, both in the Inferior Court and this Court previous to the trial"—found the defender, Gibson, "liable generally for the paid expenses incurred by the pursuer previous to the trial, and the defender, Kennedy, liable for such part of the said expenses as were occasioned by his appearance and pleading in the cause."

Patrick, McEwen, and Carment, W.S., Agents for Pursuer.

Robert Anderson, S.S.C., Agents for Gibson.

Hope, Oliphant, and Mackay, W.S., Agents for Kennedy. (W. H. T.)

No. 33.

CRAICH v. DEVON IRON COMPANY, &c.

Issues.—Terms of issues in an action of damages on the ground that the defenders had wrongfully carried away coal belonging to the pursuer.

Counter issue of acquiescence disallowed.

1st Division.

Nov. 26. 1852.

Craich v.
Devon Iron
Co., &c.

This was an action at the instance of John Craich, residing at Lower Carsbridge, near Alloa, against the Devon Iron Company, as a Company, and certain persons who were partners of that Company, or who now represent partners thereof.

The case was now called for the approval of issues. The following were proposed:—

It being admitted that the pursuer became proprietor, as at Whitsunday 1835, and at Martinmas 1841, of certain ground near Clackmannan, described &c. It being also admitted that the deceased Leslie Meldrum, now represented by the defender Mrs Euphemia Ramsay Pitcairn, or Meldrum, as his executrix-dative, became a partner of the said Devon Iron Company as at 1st November 1839, and died on 16th March 1846.

1. "Whether, during the period from the year 1832 to the year 1850 inclusive, or any part thereof, the defenders, the Devon Iron Company, wrongfully carried away coal belonging to the pursuer or his predecessors, the proprietors of the said ground respectively, to the extent of 10,023 tons, or any part thereof, and ironstone, belonging to the pursuer or his said predecessors, to the extent of 10,933 tons, or any part thereof, or either of the said coal or ironstone, from the said pieces of ground, or any of them, to the injury and damage of the pursuer, or of his predecessors, the proprietors of the said pieces of ground for the time being?"

2. "Whether, during the period from the year 1832 inclusive, to the 16th day of March 1846, or any part thereof, or during the period from 1st November 1839 to the said 16th day of March 1846, or any part thereof, the defenders, the Devon Iron Company, wrongfully carried away coal to the extent of 10,023 tons, or any part thereof, and ironstone to the extent of 10,933 tons, or any part thereof, or either of the said coal or ironstone, from the said pieces of ground, or any of them, to the injury and damage of the pursuer, or of his predecessors, the proprietors of the said pieces of ground for the time being?"

As issue of acquiescence was asked by the defender, Mrs Meldrum, but disallowed, the COURT reserving for their opinion for what period, if any, Mrs Meldrum is liable.

Issues approved of.

Monro, for the pursuer.

N. C. Campbell and Deas, for Mrs Meldrum.

Patton, for Devon Iron Company.

T. and R. Landale, S.S.C., Pursuer's Agents.

Walker and Melville, W.S., }
George Smith, S.S.C., } Defenders' Agents. (J. S. M.)

Petition, Miss ANN MACPHERSON.

No. 34.

See *ante*, Vol I., p. 868.

Executor—Liability of—Trust-Estate.—Circumstances in which an executor was held liable for money paid away upwards of twenty-five years before the claim was made.

This was a petition by which Miss Macpherson now prayed the Court to apply the judgment of the House of Lords, which remitted the cause back to the Court of Session, and “to appoint the parties to be heard on the remaining points of the case, and any remaining questions of expenses.” 2d Division.
Nov. 26. 1852.

The only remaining point now brought before the Court was thus referred to in the accountant's report. “The sum stated in this agreement to have been received by Mr James Macpherson was L.1444 : 17 : 9 ; but, as has been explained by the reporter, the sum actually received by him was only L.1317 : 7 : 7, which was lying in the hands of Messrs Coutts and Co. in the joint names of Sir John Macpherson and Mr James Macpherson. This transaction took place before the award by the arbiters of 8th June 1810 ; but the pursuer, in her answers to the accountant's notes, (page 104,) contends, ‘that Sir John Macpherson and Mr James Macpherson are, in the circumstances, conjunctly and severally liable to the executry estate for the sum of L.1444 : 17 : 9, which two executors had no power to lend out to one of themselves on his mere personal security.’ This is a point of law which the reporter is not called upon to decide, and it is respectfully left open for the determination of the Lord Ordinary.” Petition
Macpherson.

The explanation in regard to it appeared to be as follows :—In March 1810, Sir John Macpherson (one of James Macpherson senior's executors,) handed over to James Macpherson junior (another of the executors,) a sum of money, for which he took from him ‘a bond, the terms of which will be found set forth in the subjoined interlocutor of the Court.

The report by the accountant shewed that the application by James Macpherson of the sum in question to trust-purposes was not instructed, and as his estate was bankrupt, Miss Macpherson contended, that for the balance which could not be recovered from it, Sir J. Macpherson's representatives must be held subsidiarily liable.

When this sum was first claimed, Sir J. Macpherson's representatives pleaded in defence the circumstances narrated in the argument referred to, and stated that they considered “that this, as well as all other matters in issue between Sir John Macpherson and James Macpherson senior's estate was finally settled and concluded by the award of June 1810.”

With regard to this award, the Court found, 16th June 1841,—“An award was regularly given out in July 1810, by which the amount of Sir John Macpherson's claims on the trust-estate on the one hand, as well as the amount of the trust-funds for which he was accountable, as an acting trustee and executor up to the said date of July 1810, on the other, was distinctly fixed and determined, and decree passed for the balance ;”—that James Macpherson, junior, “entered into the said submission not as a co-trustee settling accounts

Nov. 26. 1852. with his associates *inter se*, but solely and substantially in his other character of beneficiary, entitled personally to the whole accruing revenue of the trust, and seeking only to enlarge the trust-property;"—and that the pursuer "is as much bound and concluded by the award as the said James Macpherson himself."

Petition
Macpherson.

Penney was for the petitioner.

Craufurd (with whom *Macpherson*) for Sir John Macpherson's representatives now argued, 1st, That the above defence, which was that originally set up, had been already sustained by the above interlocutors of the Court not appealed against, and that therefore the matter was already disposed of; and, 2d, That on the merits the defence was good.

R. Thomson for Mr Tytler, executor-creditor of James Macpherson, junior.

The COURT pronounced the following interlocutor:—"The Lords having resumed consideration of this cause, and having heard parties' procurators on the demand made by the pursuer of the action in regard to the sum of L.1317 : 7 : 7, to which the reporter called the attention of the Court; Find that the said sum was part of the capital of the executry estate of James Macpherson the elder, realized by his executors, and was advanced and lent to the late James Macpherson of Belleville, by the late Sir John Macpherson, on the bond of the former, by an agreement of date the second day of March 1810, in which the said sum was by mistake stated to be L.1,444 : 17 : 4, between the said parties, both executors of the late James Macpherson the elder, which agreement bears:—'and whereas the said James Macpherson, the executor, claims to be entitled to the residue of the personal estate and effects of the said James Macpherson, deceased, after payment and satisfaction of his debts, and also alleges that he has disbursed divers considerable sums of money out of his own funds in payment of debts due from the said deceased, and otherwise on account of his estate, and being in want of a present supply of money, has applied to the said Sir John Macpherson, for the use of the said sum of L.1444 : 17 : 9, until the same is wanted to be applied in satisfaction of the debts of the said deceased, which the said Sir John Macpherson hath consented and agreed to advance and lend to the said James Macpherson on his bond; now it is hereby declared and agreed by and between the said Sir John Macpherson, and James Macpherson; and he the said Sir John Macpherson, doth hereby promise and agree that he will not put the said bond in suit against the said James Macpherson, his heirs, executors or administrators unless he is called upon to account for and pay the said sum of L.1,444 : 17 : 9 or some part thereof to some creditor of the said James Macpherson, deceased, or into some Court of law or equity, under or by virtue of some judgment, order or decree thereof, nor shall or will transfer or assign the said bond to any person or persons whomsoever, unless by the order of some Court of law or equity;' Find that a bond was accordingly granted for the said sum by the late James Macpherson to the said Sir John Macpherson, which bond binds the said James Macpherson personally to pay the said sum to the said Sir John Macpherson, his executors, administrators, or assigns: Find that the said sum remained in the hands of the late James Macpherson, who was entitled to the interest thereof, until his death in 1833: Find that the said sum continued

to be part of the capital of the trust-estate under the management of the said James Macpherson at his death to the executors : Find that Sir John Macpherson, as executor, continued in right of the said bond, and that the same was a document of debt to and in favour of the executry of the estate, and available to the executors : Find that James Macpherson could not have refused on any ground in law, or in respect of the settlement and award in 1810, to pay the said sum under the said bond, and that if recovered the said Sir John Macpherson could not have appropriated to himself the said sum : Find that by the settlement and award in 1810, in regard to the separate intromissions of the said Sir John Macpherson personally, the said bond by James Macpherson for part of the executry estate was not discharged, or the interest of the beneficiaries of the trust in the same evacuated or excluded, and that the said bond was in no respect affected thereby, but that the said sum remained as a portion of the executry estate lent by the foresaid transaction to one of the executors, and still to be accounted for : Find that the pursuer is not barred by the import or effect of the former judgments in this cause, or on the grounds on which the same proceeded, from the demand now made for payment of the said sum, with interest thereon from and after the date of the present action : Find that the said sum so lent as aforesaid on the personal bond of one executor by himself to the other co-executor remained a portion of the executry fund, to be stated in the ultimate account thereof against both executors, and that the said Sir John Macpherson and his representatives, and the late James Macpherson and his representatives are not entitled to discharge themselves of that portion of the trust-estate by the loan under the said agreement and the said bond, and that the same must be carried into the executry-account against the executors : Therefore find the executor creditor of the late James Macpherson, representing him in this action, liable in payment of the said sum of L.1317 : 17 : 7, with interest from the date of the summons, and decern for payment thereof : And find the representatives of the late Sir John Macpherson liable in payment of the said sum, with interest from the said date, and decern for payment thereof, in so far as the same may not be recovered from the estate of the said James Macpherson : Find no expenses due to any of the parties in regard to this discussion."

Gibson-Craig, Dalziel, and Brodie, W.S., Agents for Petitioner.

Gordon, Stuart and Cheyne, W.S., Agents for Sir J. Macpherson's Executors.

J. and F. Wright, W.S., Agents for Mr Tytler.

(R. S.)

CAMPBELL and OTHERS, v. PRINGLE.

No. 35.

Relevancy—Liability—Business Account—Provisional Committee—Employment.—In an action at the instance of an agent against the individual members of a provisional committee, for payment of the balance of a business account alleged to be due to him ; circumstances in which, *Held*, That the averments were not relevant to support the conclusions of the action.

1st Division.

The pursuers in this action set forth, that they were employed as the solicitors or agents in an undertaking called the "Berwickshire Central Junction Railway" in 1845 ; and that, in that capacity, an account was incurred to them for business performance, cash advanced, and disbursements made for behoof

Nov. 27. 1852.

Campbell, &c.
v. Pringle.

Nov. 27. 1852. *Campbell, &c v. Fringle.* and on account of the undertaking. This action was brought by them against the individuals said to have composed the provisional committee, in order to establish their liability for the balance said to be still due on the account.

The general plea of the pursuers was, that in becoming members of the provisional committee, the defenders became conjunctly and severally liable for all expenses inturred in the promotion of the undertaking; and the special pleas in reference to the several defenders, were in substance a repetition of the general plea, and a more limited plea, to the effect, that at all events each of them is liable for the expenses incurred during the time he was a member of the committee, or in reference to acts adopted and homologated by him. But in reference to the last plea, there was no specification on record of any particular acts, or any portion of the expenses to which the plea was intended to be applied, as against the several defenders.

Defences were lodged for certain of the parties called to the action, and with regard to each of these a record was made up, setting forth as to each of them the share he was alleged to have taken in the matter.

The LORD ORDINARY (Colonsay) held, that "the averments of the pursuers in the record are not relevant and sufficient to support the conclusions of the summons as regards the defenders:" and, therefore, dismissing the action, and finding the defenders entitled to expenses.

In the note appended to his interlocutor, his Lordship remarked, "It appears to be now settled in England (contrary to some earlier decisions) that a person by becoming a member of a provisional committee, does not make himself liable to the other members of the committee, or to any of the officers of the association, in respect of the dealings between those other members or other officers, and third parties, *Reynell v. Lewis*, and *Wyld v. Hopkins*, 25th November 1846, 4 Railway Cases, p. 351; *Morris v. Cottle*, House of Lords, August 1850, 6 Railway Cases, p. 327. . . The Lord Ordinary is of opinion that the mere fact of a person having been a member of the Provisional Committee, and so entitled to attend, but never having attended or interfered, is not sufficient to create liability for accounts incurred to advertisers, engravers, or engineers employed by the Provisional Committee, or by any Sub-Committee appointed, in his absence, by the Provisional Committee;—mere membership is not authority for such employment, or for the incurring of such expense. The Lord Ordinary is also of opinion, although it is a more doubtful point, that such membership is not tantamount to employment of the solicitors to do all the various matters of business authorised by the attending members of the Provisional Committee, or by the Sub-Committee. It appears to the Lord Ordinary that, in reference to non-attending members of the Provisional Committee, some other facts, relevant and sufficient, must be averred, applicable either to the whole of the account claimed, or distinctly applicable to such specified parts of it as are alleged to have been authorised, or adopted and homologated, by each of such non-attending members. In the present case, it appears to the Lord Ordinary that there is an absence of such averments:—

1st, In regard to the late Sir Thomas Dick Lauder: It is averred that, at his own request, his name was put upon the list of the provisional Committee, but the date is not stated. It appears, however, from a circular by the solicitors, produced in process, and referred to by both parties, and the true date of

which, the pursuers say, was 16th October 1845, that at that date neither Sir Thomas's name, nor the name of any of the present defenders, had been put on the list of the Provisional Committee. It must therefore have been added after that date; and it is admitted that on 4th November 1845 he sent in his resignation. It is also averred that "he attended the meetings of the provisional committee, and advised and acted in support of the scheme, as freely as any other member of the committee;" but there is no averment as to the dates of those meetings, or as to the business transacted or authorised by those meetings. The first meeting of the provisional committee is stated to have been held on 28th October, when a sub-committee was appointed. It is not alleged that Sir Thomas Dick Lauder was present on that occasion, and he resigned on 4th November. These are the only averments made by the pursuers in regard to Sir Thomas Dick Lauder, and they do not appear to the Lord Ordinary to amount to such explicit averment of employment, in regard either to the whole or to any particular part of the account pursued for, as ought to be remitted to proof."

The pursuers reclaimed.

Macfarlane for the reclaimers stated, that instead of discussing the case separately of each defender, he selected the case of Sir Thomas Dick Lauder as being the strongest one for the pursuers, and if unsuccessful in it, it followed that the pursuers must be unsuccessful in all the others.

Brown for the respondent, was not called on.

The LORD PRESIDENT. I apprehend that the English cases go this length, that if a party attends meetings of the provisional committee, he is liable for what is done at these meetings, but not farther. I do not think there is here a case of liability made out against the respondent.

The other Judges concurred in thinking that the averments were not sufficient to enable them to send the case to a jury.

The COURT therefore "adhere to the Lord Ordinary's interlocutor submitted to review, and refuse the note. Find additional expenses due," &c.

John Murray, junr., S.S.S., Reclaimers' Agent.

Scott, Rymer, and Scott, W.S., Agents for Sir Thomas Dick Lauder. (J. S. M.)

KERR v. BREDISHOLM COAL COMPANY.

No. 36.

Issue—Damages.

This was a report upon a proposed issue, in an action of damages for a coal pit accident. The defender wished the insertion of the words, "*the main road*" in the issue, so as to confine the pursuer in his proof of the *locus* of the accident, to that particular part of the pit.

2d Division.
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Kerr v. Bredisholm Coal Co.

The COURT refused to allow the issue to be so limited.

J. Campbell, for pursuer.

Brown, for defenders.

D. Manson, S.S.C., Pursuer's Agent.

T. Sprot, W.S., Defenders' Agent.

(W. H. T.)

No. 37.

JAMES CASSELS v. HIS CREDITORS.

Cessio—Aliment to Bastard.—Circumstances in which the benefit of *cessio* was granted to debtor, incarcerated for the aliment of a bastard child, and expenses of action of filiation.

2d Division. This was a reclaiming note against the interlocutor of the Sheriff of Fife, granting the benefit of *cessio* to the petitioner Cassels, at the instance of Jean Keddie, his incarcerating creditor.

Cassels v. his Creditors.

The debt for which the petitioner had been imprisoned consisted of inlying charges, and the past aliment of an illegitimate child, with the expenses of the action of filiation. *Cessio* was granted by the Sheriff on finding caution for the future aliment.

W. G. Dickson, with whom *Deas*, for the reclamer, maintained that it was a general rule that no debtor incarcerated for an alimentary debt like the present was entitled to the benefit of *cessio*. In the present case there were no palliating circumstances to make it an exception; on the contrary, the debtor had repeatedly declared, as shewn in the proof, an extreme unwillingness to pay the debt; that "he would rather rot in jail than pay it," and had interfered to prevent its being paid by his friends. He had been a workman enjoying good wages, and had been perfectly able to pay. An obligation like this could not be wiped out at one blow by the debtor going to jail and then obtaining a *cessio*. At all events, he ought to be obliged to find caution for the past aliment, which was considerable in amount, while the debtor was possessed of no property. See *Ritchie v. his Creditors*, 20th Dec. 1811; *Steel*, 4th July 1812, (note to the preceding case); *Tomlinson*, 15th Dec. 1815; *A. B.*, 20th Feb. 1830; 8 S. 571; (Lord Gillies' opinion); *Baird*, 7th July 1827, 5 S. 508. In *Russel*, 11th March 1834, and *Findlater*, (*Deas and Anderson*, vol. iv), *cessio* had no doubt been granted, but only on the past aliment being secured. See also *Watt v. Leonard*, 20th Dec. 1834, 13 S. 235.

Scott for the debtor, argued that there was no good reason for refusing him the benefit of *cessio*. He was at present dependent on sixpence a day paid by the creditors. There was no allegation of concealment of funds, and the expressions of unwillingness to pay were directed more against the agent's account than against the principal debt. The case of *Baird* quoted by the creditors, had been brought up again and *cessio* granted, (as mentioned in the case of *Houston*, 13th Dec. 1828, 7 S. 193), without caution, it being shewn that he was alimented in jail by the mother of the child. See also *Houston*, quoted above; *M'Phie*, 20th Jan. 1832. Even in *Grindlay*, 3d Feb. 1838, where the party was of somewhat superior station, and there was suspicion of concealment of funds, *cessio* was granted without caution. In the present case, the debtor had been alimenting another child during the currency of this debt.

In answer to a question by the Court, it was stated for the creditors that in the case of *Findlater*, 2d July 1831, caution for past aliment had been found.

The Court unanimously adhered to the interlocutors of the Sheriff. No

expenses due to either party. It was observed, that the rule of refusing *cessio* Nov. 27. 1852.
in cases of alimentary debts no longer existed, but that each case must be
ruled by its circumstances.

Cassels v. his
Creditors.

T. and R. Landale, S.S.C., Reclaimers' Agents.

— *Thomson, S.S.C., Debtor's Agent.*

(W. H. T.)

DISBROW and MANDATORY v. M'INTOSH of M'Intosh.

No. 38.

Evidence—Foreign Court.—*Held* that a certificate of probate, purporting to be signed by
a foreign judge, and having a seal appended, requires some other evidence that it is what
it professes to be.

This was a report by Lord Rutherford of the following point:—The ori-2d Division.
ginal pursuer having died, his son applied to be sisted in his place. The son Nov. 27. 1852.
is resident in the United States, and, along with a mandate to the agents,
there had been produced, as evidence that he represented his father, a certi-
ficate of probate, purporting to be signed by the Judge of the Probate Court
of Monroe, State of Michigan, and having a seal appended.

Disbrow, &c.,
v. M'Intosh.

His Lordship stated, that he felt a difficulty in giving effect to this as
evidence, as there was no proof offered of the authenticity of the document, or
that it really was what it professed to be. It might have been authenticated
by the British consul, or some other person of whose existence the Court here
was aware. Moreover, the document did not bear to be an original one, like
letters of administration, but merely a certificate of probate.

Buchanan for pursuers.

Duff for defender.

The COURT were of opinion that process should be sisted till January, for
the purpose of supplying the defect. There was here no evidence that this
was the signature of the Judge in question, or that any such person existed.
The evidence of the mayor of a town, or of a notary public, who in virtue of
his office, had a sort of world-wide character, was often made use of in such
cases. There could be no hardship in delay, for a purpose which was no
more than what the *comitas gentium* demanded.

Sang and Adam, S.S.C., Pursuers' Agents.

Murray and Ferrier, W.S., Defender's Agents. (W. H. T.)

PETITION, EARL OF ROSEBERY.

No. 39.

6 & 7 Will. IV. c. 42—11 & 12 Vict. c. 36.

This was an application under the Acts of the 6 and 7 Will. IV. cap. 1st Division.
42, and 11 and 12 Victoria, cap. 36, to authorise an excambion of certain Nov. 30. 1852.
subjects, one of them a right of patronage between the petitioner and the Earl
of Hopetown. The Court approved of the proposed transaction, holding
the competency of the excambion of a right of patronage under the former of
these Acts to be settled by the case of *Earl of Kinnoul*, 16th July 1840, 2
D. 1458.

Petition, Earl
of Rosebery.

Duff for the petitioner.

Murray and Ferrier, W.S., Petitioner's Agents.

(J. S. M.)

No. 40. MARK SPROT AND THOMAS SPROT, SUSPENDERS, v. W. MORRISON,
(Young's Trustee,) CHARGER.

Landlord and Tenant—Retention.—Held that a subtenant of minerals had no right to retain from the principal tenant rents past due, in security of prospective claims of damages on account of alleged disturbance by actions of reduction (still pending) of the principal tenant's lease, at the instance of the landlord.

2d Division.

Nov. 30. 1852.

Sprot v.
Morrison.

These cases were suspensions at the instance of Mark Sprot, Esq. of Garnkirk, and Thomas Sprot, W.S., of charges against them at the instance of W. Morrison, writer in Glasgow, only surviving trustee of the deceased James Young, tenant of the minerals of the estate of Bredisholm. The suspenders are sub-tenants under the charger, of a portion of these minerals, and the charges were for payment, the one of L.200 of rent due at Whitsunday 1852, and the other of the same sum due at Lammas 1852, for the said subjects. The merits of the two cases were identical, and the material circumstances will be found in the subjoined arguments of counsel.

The Lord Ordinary on the Bills (*Murray*) had passed the notes of suspension on consignation, and caution for expenses.

The charger reclaimed.

Hector, for the charger, stated that the main ground of resisting payment was the raising of certain actions by two successive landlords, heirs of entail in possession, of his, (the charger's), lease, by which the suspenders alleged that they were disturbed in the peaceful possession of the subjects. The suspenders were in full possession, and any claims of damage or otherwise which might possibly emerge to them in respect of these actions, being future, uncertain, and illiquid, could not confer upon them any right to retain rents past due, which were liquid claims. Moreover, that the sublease had been entered into by *Murray*, in whose shoes the suspenders now stood, with full knowledge that one of these actions, (soon after abandoned), was then pending. A new action was, no doubt, now pending, of the same kind, by the heiress at present in possession, but it was directed solely against the charger, the principal tenant, who was not to blame for its existence, and was opposing it as best he might.

Broun, for the suspenders, stated, that since the beginning of the sublease in May 1846, there had been a series of annoyances on the part of the successive landlords, which had disturbed the suspenders in that "peaceable possession" of the subjects, which was guaranteed to them by the clause of warrandice in their sublease. He did not admit that it was originally entered into by his clients' author, in the knowledge of the proceedings then pending. At all events, another action of reduction of the charger's lease was instituted by the next heir in possession in December 1846, and also a process of interdiction against both the charger and his sublessees, to prevent them from working the minerals. These proceedings depended till July 1848, when they were terminated by a compromise, one of the terms of which was, that the suspenders were to pay to the landlord and his successors a portion of the rent formerly paid to the principal tenant. By the same agreement, an arbitration (still pending) was entered into before Mr (now Lord) Anderson,

between the suspenders and chargers with regard to a claim of damages, and of retention of rent, made by the former, for the disturbance occasioned by these proceedings. A new heir of entail succeeded in 1849, and raised a third action of reduction of the lease, still in dependence. By all these proceedings, the suspenders stated, that they had suffered great loss and damage. Should the present reduction succeed, of course their sublease would fall along with that of the principal tenant. They had expended a very large capital upon the works, which would, in that event, be lost, and they had difficulty in letting portions of the subjects to subtenants of their own, as was necessary for their working. The immense outlay requisite placed them in a very different position from agricultural tenants, and they claimed a right of retention of the rents until their claims of damage should be settled.

Nov. 30. 1852.

Sprotts v.
Morrison.

The LORD JUSTICE-CLERK observed, that the Lord Ordinary had pursued the proper course in passing the note, to have this question deliberately tried. It was, however, quite clear, that the subtenants had no right of retention. The two first actions of reduction had no bearing upon the question. These actions had been withdrawn, and the suspenders were all the time admittedly in possession. Neither were they disturbed in their possession by the present action. There was no *via facti* interruption of their workings. There were no proceedings against *them* by the landlord, who was still receiving his stipulated share of the rent from them. No *present* loss was condescended on. The only interruption to their "peaceable possession" which could be meant, was disturbance of their peace of mind. If so, and they thought their tenure precarious, it might be matter of prudence not to extend their lease or their works. Their only alleged loss was *future*, and when it should be proved, there were ample remedies for them. Until their claim should be constituted (not by a decree of Court, but by facts clearly causing it and permitting its nature and amount to be ascertained,) it could not be put in competition with a liquid debt, such as rent past due, so as to confer a right of retention. Could they have specified an actual non-implemment of his obligations on the part of the principal tenant, it might have been otherwise; but he had done nothing; on the contrary, he was defending his own right and theirs.

LORD COCKBURN concurred, on the ground that a liquid and illiquid claim could not be put in direct competition.

LORD MURRAY concurred, stating that he had passed the note merely to allow the question to be fully considered.

LORD WOOD concurred.

The COURT therefore altered, and remitted to the Lord Ordinary to refuse both notes of suspension.

W. Muir, S.S.C., Suspenders' Agent.

T. Sprot, W.S., Charger's Agent.

(W. H. T.)

LEIGHTON v. RUSSELL.

No. 41.

Husband and Wife—Jus relictæ—Settlement—Provision—Revocation.—A husband executed a settlement, which was also subscribed by his wife as consenting thereto. By this deed the husband conveyed to his wife the free annual proceeds of his heritable and move-

able estate, while she should survive him. The deed contained no discharge of the wife's *jus relictae*. It contained a power of revocation. The wife predeceased the husband, who executed another deed revoking all previous settlements :—*Held*, in a question between the wife's next of kin, and the universal legatee of the husband, that the settlement subscribed by the wife was not equivalent to a mutual contract by which she could be held to have renounced her legal rights, and that therefore one half of the goods in communion at the dissolution of the marriage belonged to her next of kin.

1st Division.
Dec. 1. 1852.

Leighton v.
Russell.

In this case there were two conjoined processes, of count and reckoning, and of proving the tenor. The pursuer in the count and reckoning was Andrew Leighton, executor-dative *qua* nearest in kin, decerned and confirmed of his mother, the deceased Mrs Janet Leighton or Fleming. In 1833, Mrs Leighton, then a widow, married the now deceased Thomas Fleming. The marriage subsisted till 1835, when it was dissolved by the decease of Mrs Fleming, who died intestate, and without issue of the marriage. The action was directed against Russell, as sole executor and universal legatee of the deceased Thomas Fleming, on the narrative, that one-half of the funds and property which formed the goods in communion at the time of the dissolution of the marriage devolved upon and belonged to Mrs Fleming's children, by her first marriage, as her nearest of kin, and now falls to be recovered by the pursuer as her executor.

The defender pleaded, *inter alia*, that this claim was barred by the consent of the pursuer's mother to a mutual deed between her and Mr Fleming, executed in December 1833, after the date of her marriage. Of this deed the defender brought an action of proving the tenor against Leighton and others, who, after proof had been adduced, lodged a minute admitting the terms of the deed as quoted in the summons, and that the deed was extant until after the death of Mrs Fleming, and agreeing to repeat the same admission in the action of count and reckoning, all questions *hinc inde*, as to the effect of these admissions being reserved entire for the disposal of the Court. Thereafter, an interlocutor was pronounced, finding it unnecessary to pronounce any decree in the action of proving the tenor, and of consent conjoining the processes.

The terms of the settlement of December 1833, so far as essential to the present question, were as follows. The deed runs in the name of Mr Fleming as *granter*, and proceeds upon a resolution "to make a settlement of my means and estate, so as to prevent all disputes concerning the same after my death;" it bears to have been executed "with the special advice and consent of Mrs Janet Gloak or Fleming, my spouse," and was subscribed by her as a consenting party. The granter conveys his whole estate, heritable and moveable, in trust to certain trustees, "for the uses, ends, and purposes, after mentioned." The *first* of these purposes is the payment of debts; and the *second* requires the trustees "to give my whole furniture, and bed and table linen within my house at Friarton, to my said spouse Mrs Janet Gloak or Fleming, to be at her disposal immediately upon my death; and with respect to the remainder of my estate, heritable and moveable, they shall levy and pay over the free annual proceeds of the same to my said spouse during all the days of her life, while she shall survive me, and that at the term of Martinmas yearly, she having the option of living in my house at Marytown

above disposed, if she shall prefer that to the trustees setting the same, and Dec. 1. 1853. paying her over the rents."

The testator then directs his trustees, upon the death of his wife, to distribute his estate, heritable and moveable, among certain of his own relations, reserving "full power to me by myself alone, at any time of my life, to revoke, alter, cancel, or innovate these presents, in whole or in part, as I shall think proper."

Leighton v.
Russell.

The testator, after his wife's death, executed another settlement, containing a general clause revoking all previous settlements.

For the next of kin, the pursuer in the action of count and reckoning, it was pleaded that the present claim was not barred by this deed, in respect, (1,) it contained no discharge of Mrs Fleming's *jus relictæ*, and (2,) the deed was cancelled and revoked by the granter.

The Lord Ordinary (Dundrennan) held that the deed barred the claim, and therefore sustained the defences, and assoilzied the defender, George Russell, from the conclusions of the action of count and reckoning, &c. His Lordship viewed the deed "as a mutual and *bilateral* deed between Mr and Mrs Fleming, very much of the nature of a postnuptial contract, and to which the same rules of construction must be applied, as if it had been in that form." Mrs Fleming accepted the provision contained in it. The power of revocation was never exercised by Mr Fleming to his wife's prejudice." "That at a subsequent period, and after Mrs Fleming's interest in the settlement had been extinguished by death, Mr Fleming may have destroyed or revoked the deed, seems immaterial." His Lordship referred to Erskine, B. iii. t. 3, sec. 30; *Meuzies*, 26th July 1666, Mor. 6448; *Holmes*, 2d February 1677, Mor. 6448; *Riddell v. Dalton*, 28th November 1781; *M'Kinnon v. M'Donald*, 24th February 1763; *Hogg*, 24th December 1746, reported by Lord Kilkerran, *Agnes Bell v. James and David Laurie*, 14th May 1801, Baron Hume 486; *Borrie and Others v. Coldstream*, 30th June 1843.

The pursuer reclaimed.

Monro, and the *Lord-Advocate*, for the reclamer. This is a deed of a purely testamentary character, revocable till the death of the testator, and being cancelled and revoked before his death it never became a deed at all. There is not here a liferent, but only the promise of liferent, and that not binding on the maker of the promise. The question must be considered as before the wife's acceptance of the liferent, and not as after the husband's death. Her subscription of the deed is not equivalent to acceptance of liferent, for this reason, that the other party is not bound. The liferent was not intended as an equivalent for her share in the event of her predecease.

Moncreiff, and *Deas*, for the respondent, referred to the cases of *Thomson v. Laurie*, 18th Feb. 1743, Mor. 6142; *Boyes v. Sandilands*, Mor. 5049.

The LORD PRESIDENT. In this case, which I must say is not at all a very simple one, the result to which I have arrived is adverse to the interlocutor. The deed, which is founded on as a bar to the claim by the next of kin, and which is said to be no longer existing, is not an ante-nuptial or post-nuptial contract, but a testamentary deed by the husband, contemplating throughout one event, the settlement of his affairs in the event of his decease. Now, it would

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require something very strong and clear in that state of matters to exclude the present claim; (1,) you must rear up a deed through which no party is at present claiming anything, and give to that due effect against the legal rights of the next of kin; and, (2,) give that effect to a deed which solely has reference to the settlement of the affairs of the husband in the event of his death. There is no case I think precisely similar to the present. In the passage which is referred to in *Erskine*, and in most of the cases referred to, the question is dealt with as in reference to the right of the wife, to whom a large provision has been made, or to whom the liferent of the husband's estate has been given, to claim both provisions. The wife had survived and made her claim, and the question arose, as to whether, taking the provision under the deed, she thus excluded her legal rights. None of these cases have reference to the question of the wife predeceasing, and the next of kin claiming her share of the goods in communion. In most of these cases also, the question arose upon a contract entered into by the parties, with a view of settling their respective rights. Those cases of contract therefore are not equivalent to the present. Now the deed in the case before us, is one by the husband, in which he is regulating the settlement of his own affairs, and to which the wife has given her assent. The most analogous case to the present is the case of *Borrie*, but that case is in some respects different from the present. I consider it to be important in that case that there was an express declaration that the provisions in favour of the wife were to be in full satisfaction of her legal rights. The deed also contemplates the predecease of the wife.

In the present case I do not find in the deed a single expression which contemplates the event of the wife predeceasing. It is a deed which throughout has reference to the predecease of the husband. Then there is another difference from the case of *Borrie*. In this case the husband, if he did not actually cancel the deed, exercised his power of revocation to the fullest extent. Are we to assume, therefore, that there was such a discharge by the wife of her legal rights, as applicable to both events of her predeceasing her husband, and of her husband predeceasing her, as excludes the present claim? I would require to have that very clearly made out before I could assume it. There is nothing on the face of this deed which shows that the attention of the wife was in any way called to the event of her predecease, or that she was giving away rights of her next of kin in that event. But we are asked in the case of the wife giving her assent to a deed of a testamentary character by her husband, to deduce the inference that she must be held to have given away all her interest, as well as that of her next of kin, leaving to her husband the power to revoke the deed, and do away with all that she may be supposed to have bargained for in so giving away her interest and that of her next of kin. If it was of the nature of a mutual settlement, why was the power of revocation here an annihilation of all that was stipulated for in the deed? I cannot adopt that view. If the next of kin were here claiming through the deed, and the husband were to say, here is a mutual settlement, that would have been a different case. But that is not the case here. The parties are not claiming through that deed. They are claiming through the only deed of the husband in which he had revoked and extinguished the deed to which the wife is said to have been a party. In this respect it differs from

the case of *Borrie*. If we are asked to draw inferences against the wife as to Dec. 1. 1852. matters which it does not appear were properly brought before her, I am not for carrying the case the length of holding that by implication she has so given away her rights. I do not think it necessary to pronounce anything as to proving the tenor. Leighton v. Russell.

LORD FULLETON. I think there is a distinction between the cases on which the Lord Ordinary has put his judgment and the cases now before the Court. In the passage referred to in *Erskine* the author was considering the question of marriage contracts. All the cases to which reference is made are cases of marriage contracts. No doubt some of them are cases of post-nuptial contracts. That makes no difference. The question is, what rule of construction shall be applied to this particular deed, and in reference to that, I think that a post-nuptial contract stands in the same position as an ante-nuptial contract, for both parties are contracting. Now, I do not think that in this case the wife can be held to have renounced her rights by implication. If there is anything a party binds himself to do, which is inconsistent with something else, which, but for that, he might be called on to do, he might fairly be held to have abandoned that right by implication; but when all that is done is the consent by the wife to the husband granting a gratuitous and testamentary deed, and a deed in which he specially reserves his power of revocation, it is impossible to apply this principle of construction. It would have been another case if the husband had renounced his powers of revocation. That would have brought it very near the case of contract. But where there is an express power of revocation, I cannot hold that this, with the mere consent of the wife to a deed which binds the husband to nothing, implies a surrender of her legal rights. The case of *Borrie* leaves nothing to implication. The wife there renounced expressly. No doubt a party may renounce everything, and take anything she chooses as a substitute, if she expresses her intention clearly. But I am not for carrying implication further than it has been already done, and I cannot hold the consent of the wife to the deed in question in this case, to be equal to the binding obligation in a contract to give up her rights.

LORD CUNINGHAME. I also find great difficulty in adhering to the interdictor under review, which proceeds on the assumption, that the wife, at the date of the deed referred to, instantly renounced all the legal rights of herself and her family, in return for the *revocable* provision of a liferent granted by her husband under the deed of 1833, which, in other respects, was only to commence at a term that the wife never arrived at. As I think it would not have been right and honourable for the husband to have asked any such absolute obligation from his wife to take *immediate* effect whether she survived him or not, I am bound to suppose this was not intended; and generally I am of opinion, on obvious grounds of law and equity, that the deed can have no construction that would lead to manifest injustice and imposition.

It has, however, been argued, that the wife, by *subscribing* the deed, admitted her immediate consent to accept a *contingent* provision in lieu of her legal powers, and never retracted. But I conceive that such a plea is not equitable or maintainable in the construction of the present deed. This was merely a prospective mutual contract, which never took effect. The settle-

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ment was not to come into operation till the death of the husband, while he reserved to himself a power of revocation ; the wife's consent must be held as given only under the implied *condition* that she should *survive*, and could have the power then of claiming (or possibly of rejecting) the liferent provision. The condition of the settlement never was purified during the wife's life—and of course, the deed as to her and her successors fell to the ground.

LORD IVORY. I confess that at various times I had formed various opinions on this case, but the opinion to which I have now arrived is, that this interlocutor ought to be altered. This is not a case of marriage-contract in which the law, in construing such documents, always presumes a far wider consent. This is a case in which, if the wife had not consented to the deed, the husband could only have disposed of his own dead's part, and could not have affected the case of the wife. She consents, but she consents to it as a deed of the nature of a testamentary deed, and her consent is available only through the operation of the deed itself. But if the husband has cancelled that deed so that it no longer subsists, how could the consent which was attached to that deed alone inure to a separate one. It is only when the deed comes into operation that the wife is not to oppose its operation. Unless the deed subsists and is to be carried into operation through the consent of the wife, that consent does not operate at all, and the important circumstance in this case is, that the husband has exercised the power of revocation which was contained in that deed. It is said that he has exercised that power with the consent of the wife, but what is that but that since he is not pleased with the deed, she consents to his using his own powers. That however does not bind her to the deed he so executes. This case certainly comes nearer to *Borrie's* than to any of the others. The case of contract raises another principle of construction. But this case is distinguished from *Borrie's* in the absence of the wife discharging her legal claim, and also in the revocation of the deed.

The Court "recall the interlocutor of the Lord Ordinary reclaimed against, Find that the reclaimer, as executor of the deceased Mrs Janet Gloak, is not barred from insisting in the conclusions of the summons of count and reckoning and payment . . . but is entitled to have the same proceeded with : Remit to Lord Cowan, as coming in the place of Lord Dundrennan, to proceed farther in the conjoined processes as shall be just, with power to his Lordship to dispose of all questions of expenses which are hereby reserved entire."

Lawrence M. Macara, W.S., Pursuer's Agent.

T. and R. Landale, S.S.C., Defender's Agents.

(J. S. M.)

No. 42.

GRAY v. BRASSEY.

Reparation—Master and Servant—Relevancy—Action of Damages.—Circumstances in which an action of damages was held relevant at the instance of a person employed by a contractor on a railway, against the contractor, on the allegation that he had sustained injury in consequence of a defective break on a waggon ; and that, for the negligence in not providing a proper break, the contractor was responsible.

1st Division.

Dec. 1. 1852.

Gray v.
Brassey.

This was an action of damages which now came before the Court, on the question, whether there were relevant allegations set forth by the pursuer in the summons sufficient to entitle him to an issue for the trial of the cause.

The pursuer was employed by the defender Brassey in the execution of a contract with the Caledonian Railway Company, for the maintenance and keeping in repair of the line; and while acting as breaksman to a train of ballast waggons employed on the railway, the pursuer met with an accident, in consequence of which, amputation of one of his legs became necessary. The summons set forth that it was the duty of the defender, or others acting for him, to provide waggons, and to see that they were in proper working order, and, in particular, provided with proper breaks and corresponding blocks to regulate them in their stoppages; that Brassey, or those acting for him, neglected these precautions in regard to one of the waggons; that in consequence of this negligence, when the pursuer stepped on the break in order to stop the train, owing to the want of a block, the break slipped down with him, and he fell, when one of the waggons passed over and severely injured his left leg, and that it was within the defender's power to have provided against the consequences resulting from any waggon being used which had no break, or no proper break or block attached to it, and was not in good working order, and that, in these circumstances, the defender Brassey is liable in reparation and damages to the pursuer for the loss and damage so sustained by him.

The defender pleaded, *inter alia*, that no action lies at the instance of a servant against his employer, founded on the alleged fault or negligence of a fellow-servant, which is the nature of the present case.

The Lord Ordinary (Cowan) "in respect of the judgment of the Second Division of the Court in the case of *Dixon v. Ranken*, 31st January 1852, repels the first plea in law stated for the defender; finds that there are relevant allegations set forth by the pursuer, to entitle him to an issue for the trial of the cause," &c.

The defender reclaimed.

Deas, and the *Lord-Advocate*, for the reclamer. The liability of a master in regard to his servants must be, in the general case, limited to this, that he selects proper servants for the work he puts them to; but while this is the rule with regard to injuries done to third parties, much stronger is the case in a question between fellow-servants. No want of diligence is averred here on the part of the master. It is not said that the negligence which caused the accident was that of the defender personally, but of those in his employment. In such a case the master is not liable. The case of *Dixon v. Ranken* does not trench on this rule of law, but is reconcileable with it; while to recognise such liability would prove most serious in regard to the large contracts which are now entered into. English decisions support this plea. *Priestly v. Fowler*, 1837, 3 M. and W. p. 1; *Hutchinson v. The York, Newcastle, and Berwick Railway Company*, 1850, 19 Law Journal, N. S. p. 296; *Wigmore v. Jay*, 1850, 19 do. p. 300; also the Scotch cases of *Paterson*, 1st July 1851; and *Linwood v. Hathorn*, House of Lords, 19th March 1821, 1 S. Ap. Cases, 20.

E. S. Gordon, for the respondent, admitted that in point of fact, Brassey was not present on the occasion, but contended that he was liable for the negligence of his servants, and referred to *Baird v. Hamilton*, 4th July 1826, 4 D. 970; *Sword v. Cameron*, 13th February 1839; *Macaulay v. Buist and Co.*, 9th December 1846; *Sneddon v. Addie*, 16th June 1849.

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Brassey.

The LORD PRESIDENT. This case raises up a point which is comparatively new with us. The opinion I have formed is, that the interlocutor of the Lord Ordinary is right. The question to be determined is one of relevancy, and upon that question we must take the allegations of the pursuer, as these are set forth in the summons, which is his record. If he succeeds in establishing at the trial all these allegations, he makes out a relevant case. I do not see that in giving effect to this opinion, we are disregarding the authorities which have been cited and pressed on us here. All of these authorities when properly sifted, go to sustain the relevancy of the claim. English cases have been also cited to us to shew that a master is not responsible for the injury done by one servant to another. That is put to us as a general rule of English law. I cannot say that I know it to be so. My impression is, that the cases do not support any such broad and absolute rule as that. The case which has been referred to particularly, is the case of *Hutchinson*, and the law as laid down by Baron Alderson. With the exception of certain words used in too general a sense, there is not much that we can dissent from in the doctrine there laid down. The principle upon which I would attach liability in some of his illustrations, is different from that upon which Baron Alderson proceeds. The principle of our law is, that *culpa tenet suos auctores*, and in that way we hold that the servant who causes the injury is himself liable to be sued as a wrongdoer. I am not prepared to say how the law of Scotland would be, as to the master's liability, where two parties are put to one operation which requires the combined efforts of both to carry it on, and one receives injury at the hands of the other, how far, in such a case, the doctrine would go. When the case is put, if my coachman is driving along a road and injures any one, I am liable; I hold that to be the law of Scotland too. But suppose the party injured is your own servant coming out with vegetables to your house, the coachman and he are not co-labourers there. They are separate parties, and I am not prepared to hold that the liability would not extend there, in the same way as in the case of injury done to a stranger. They are servants of the same master no doubt, but engaged in different operations. Now, in the case of *Dixon* there was another principle involved. It must result from the rise of new occupations and the progress of machinery that new relations between masters and servants, and new duties must also arise. It was there held, that where there ought to have been superintendence, which was neglected, the master was liable. Now, in the present case, the pursuer libels that it was the duty of Brassey here to have provided certain machinery. That this pursuer was a labourer who was not in that department at all, and that for his safety and the safety of those engaged in the operation in which he was engaged, it was the duty of Brassey to see that the machinery was so provided, and that in consequence of Brassey's failure of duty in this respect, the pursuer was injured. Now, that was a liability arising from negligence in another department from that in which the pursuer was engaged, and I think if he make out his averment, there is a relevant case. In the case of *Linwood*, it appears to me that the relief which the master obtained there, arose from a different ground altogether. The Court was sitting in judgment on evidence as well as relevancy, and they held that there was

no evidence that the act which caused the injury was done in the course of Dec. 1. 1852. the master's employment. I cannot go along with the opinion, that all cases of liability for injuries in our law arise out of contract; but on the other hand, I think that the principle is not to be extended farther than it has hitherto been, in holding liability to attach to the case where the servants being engaged in separate departments, the master has a duty to perform in providing for their safety, and fails to do so, and thus injury arises from the neglect in one department to the servants employed in another department altogether. I do not think it comes within the class of cases of *Dixon*. Who was the master then comes to be the question. In that view of the case, I think that the summons is relevant, and I am disposed to adhere to the interlocutor of the Lord Ordinary.

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LORD FULLERTON. I am of the same opinion. The defender's plea is very general, and goes very far. There is a great deal in the remark, that when parties employing servants in different kinds of work, come to employ them in work which requires the assistance of each, a difficulty might arise as to liability, if an accident should then occur. The allegation here is in regard to the piece of machinery, which ought to have been safe for the party to use, and that the party whose duty it was to see that it was a safe piece of machinery, had neglected to do so. If it was to come out quite clear that this man did something so rash as to endanger his own life, I do not know what view a jury might take, but as the case comes before us, I quite agree with the Lord President.

LORD CUNINGHAME. I entirely concur in the opinions that have been delivered. While we shall at all times be ready to adopt and receive instruction from English practice, the present case belongs to a class, in which we are not entitled of our own authority, to alter and reverse the ancient grounds of liability between master and servant in Scotland. Although our reports for many years, show that masters have been held liable to all third parties, (without excepting fellow-servants), suffering from the negligence and unskillfulness of other servants hired by the employer, followed up by the late case of *Dixon v. Ranken*, in the Second Division, the books hardly shew the extent of the understanding in Scotland, as it is believed there is no man of common intelligence and experience in our affairs, who entertained a different opinion. Many industrious people may have relied on that security; and at any rate, when servants in this country have suffered severe injury from the fault of another workman hired by the master, we are not entitled suddenly to abrogate the responsibility of the latter existing at the date of their employment. The law of Scotland on this point has been long established and acted on; while this question is new in England, arising merely under an Act recently passed; and I must with perfect deference, remark that the reasons assigned in the English cases for the distinction urged by the defender, do not appear to me to be altogether satisfactory or reasonable. As it stands, this allegation is clearly relevant, and if proved, it may infer damages. On the other hand, if it be shewn at the trial, that the injury, was not attributable to the defender, but to the carelessness or want of caution of the pursuer himself, no issue is necessary to prove that, as the fact may be established in answer to the pursuer's issue. The relevancy of the plea is settled in England by

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a series of cases past question. See *Cattlin*, 8 Man. G. and S. 115; *Rigby*, 5 Wels. H. and G. 240.

LORD IVORY. I am substantially of the same opinion with all your Lordships. I desire in this case to pronounce no judgment which has reference to the law of England. On the other hand, I do not wish in this stage to favour anything like the adoption of abstract resolutions on matters of law, and therefore I wish my judgment to be confined to the allegations in the present case. My observation on the defender's plea may not be material with the caution that has fallen from the other Judges; but the plea is broad and unqualified, and for that reason I fear the rejection of it may do harm. I agree with the doctrine laid down by Lord Mackenzie in the case of *Shedden*, 16th June 1849. If from latent and undiscovered faults in it, which the owners have taken every precaution to make perfect, an accident arises, I read our law, that in that case the master is not liable, and so with the servant. If the master has done everything in his power to have proper servants skilled in their department, and such that no prudence on his part could have guarded against irregularities in their after conduct, I am not prepared to go the length of what is laid down in abstract with regard to that. Analogies have been referred to. I think it is dangerous to make use of them. Now in this case the contract is between master and servant. If the master places the servant in a particular position, he must protect the servant as he must any other party. He must so use his own that he shall not injure the interest of others. The analogy which comes nearest to this case is that which makes a servant liable in regard to third parties with whom there is no contract whatever. If my servant is driving me on the public street, and a third party is injured, I am liable in an equitable reparation to the party who has sustained injury at the hands of one for whom I am responsible. It is not a case of contract; and so the cases of *Linwood*, &c. are explainable in this way. But when we come to this case, looking to American cases, and to the other cases in the Second Division, I think there are *dicta* in them all which would carry the law to extreme length. I am not disposed so to adopt such *dicta*. A man is not *versans in illicito* when he keeps a watch dog, and when he keeps a peaceable one he is not liable for an injury done by it; but if he knew that the dog had exhibited symptoms of vice, then from neglect of giving such security against it as he ought to have done, he is liable. Now a dog is a sort of fellow-servant in his way; and so also, if my carriage is upset, and the coachman injured, I am not prepared to hold, that because the horses are mine, that a sudden miscarriage from fright, I am liable for the injury thereby arising to the coachman.

Now, as between servant and servant, if I am to be liable without any fault of my own for the neglect of one servant, why should I be free when that servant is acting criminally? Have I warranted all my servants in that sort of way? I think the presumption is, that where injury arises from neglect, the master must be presumed to be so far liable that he did not take a proper superintendence; but if a jury found that the master has done all that by possibility he could do, and that there was no *culpa*, direct or indirect, on his part, all I would say now is, that I am not prepared to hold that there would be a ground of liability if one of the servants were the cause of injury to

another. But we are not called on to deal with an abstraction in this case. Dec. 1. 1852. On the whole matter, I think that the interlocutor should be adhered to. But I should like to see out of the interlocutor, "in respect of the judgment of the Second Division," and also "repels the second plea of the defender;" with these observations I concur. My fear is lest we give weight to an abstraction which is unnecessary to the case. Gray v. Brassey.

The COURT "refuse the prayer of the reclaiming note, adhere to the interlocutor of the Lord Ordinary reclaimed against, and remit to his Lordship to proceed farther as shall be just, reserving in the meantime all questions as to expenses of process."

G. L. Sinclair, W.S., Pursuer's Agent.

Hope, Oliphant, and Mackay, W.S., Defender's Agents.

(J. S. M.)

Petition, DAVID ROBERTSON and OTHERS, for a Judicial Factor.

No. 43.

Judicial Factor—Trustees.—Where certain trustees named by a trust-deed to manage a trust estate, any two to be a quorum, all declined,—the Court refused, on the application of the beneficiaries, to appoint one of the said trustees as judicial factor over the estate.

This petition set forth that the deceased Mrs Margaret Ritchie or Robertson, who resided in Perth, by trust-deed and settlement and codicils thereto annexed, conveyed her whole estate and effects, heritable and moveable, to seven trustees, one of whom had died, and the others had all declined; and in consequence there was now no person authorised or entitled to administer and protect the estate, to execute the purposes, and wind up the affairs of the trust. That the petitioners are the whole residuary legatees under the trust-deed, and are the parties chiefly interested therein as beneficiaries, and that having full confidence in Mr James Dick Miller, writer in Perth, they prayed the Court to appoint him judicial factor. Mr Miller was one of the parties who had been named trustee by Mrs Robertson, but who had declined to accept. 1st Division.
Dec. 1. 1852.
Petition, Robertson, &c.

Gifford was for the petitioners.

By the COURT. It is incompetent where a party has been named to a gratuitous office to appoint him in another form, so as to make the office remunerative.

Gifford. Mr Miller could not have saved the trust by his acceptance, as two were required to be a quorum; and here his appointment is sought by the chief beneficiaries under the trust-deed.

LORD IVORY. The circumstances are precisely the same as in the late case of *Pennycook*, 20th December 1851, 14 D. 311. There the Court refused to make the appointment.

The COURT refused to appoint Mr Miller; and continued the petition that another party might be named.

Alexander Gifford, S.S.C., Agent.

(R. S.)

Petition, JOHN WATSON, for Factor *loco tutoris*.

No. 44.

Act of Sederunt, 11th December 1849, § 2—*Factor loco tutoris—Bond of Caution.*—Where the requisite attestation in a bond of caution required to be found by a factor *loco tutoris* is not lodged till after the thirty days from the date of the factor's appointment, a new application for the appointment of a factor is not necessary.

1st Division. The Act of Sederunt of 11th December 1849, § 2, provides that the time
 Dec. 1. 1852. for a factor or curator finding caution "shall be one calendar month from the
 Pet. Watson. date of such appointment, the Court hereby reserving power, on cause shown,
 by application made at any time before expiry of that month, to prorogate
 the time for finding caution." In this case the bond of caution was prepared
 and duly lodged with the clerk of process, but, unavoidably, the certificate of
 the cautioner's solvency was not lodged till after the expiry of the thirty days.
 No application for prorogation had been made within the month. The
 necessary certificate was now ready to be lodged, and the question now was,
 whether that being so, and the bond not having been fee-funded till after the
 expiry of the month, the bond of caution could now be received, or whether
 a new nomination of a curator would be necessary.

MacNiel for the curator submitted that the certificate was not so much of
 the essence of the bond that the irregularity which had occurred in regard to it
 should prove fatal to the bond and to the nomination of the curator.

The COURT held that a new application for the appointment of a curator
 was unnecessary; they therefore re-appointed the same party as curator, and,
 of new, ordained him to find caution in terms of the Act of Sederunt.

William Wotherspoon, S.S.C., Petitioner's Agent.

(J. S. M.)

No. 45. The TRUSTEES of the HARBOUR of HELENSBURGH v. The CALE-
 DONIAN and DUMBARTONSHIRE JUNCTION RAILWAY Co.

Contract—Implement—Railway Company—Provisional Committee—Incorporated Company.
 —The committee of management of a projected Railway Company and the Magistrates of
 a Burgh entered into an agreement, by which the Railway Company were to obtain liberty
 to lay down rails along the streets of the Burgh to the Harbour, and the Magistrates were
 to enlarge the Harbour, and both parties were to apply to Parliament for Bills to enable
 them to carry these purposes into effect. It was also agreed that the Railway Company
 were to advance a certain sum to defray the expenses of enlarging the Harbour, and which
 sum was to form a real lien on the Harbour till paid. The Bills having been obtained,
 the Railway Company refused to implement the agreement, on the ground that it was not
 binding on the corporate body, and also that the Harbour Bill contained no power to create
 a real lien on the Harbour, and, therefore, that the Harbour Trustees were not in a posi-
 tion to demand implement of the agreement:—*Held* that the terms of the agreement were
 not *ultra vires* of the committee of management who entered into it; and, therefore, that
 it was binding against the Incorporated Company, and that as the Harbour Bill contained
 powers to borrow money on the security of the dues, &c., the Harbour Trustees were in a
 position to fulfil their part of the agreement, and so to demand implement on the part of
 the Railway Company.

1st Division. This was an action brought at the instance of the Helensburgh Harbour
 Dec. 2. 1852. Trustees against the Caledonian and Dumbartonshire Junction Railway
 Company, to enforce implement of an agreement entered into between the
 Helensburgh Harbour Trustees v. Caledonian, &c. Rail. Railway Company and the Magistrates of Helensburgh in February and
 March 1846, before the Railway Company had obtained their Act of incorpo-
 ration, or the Harbour Trustees the Act vesting them with their present sta-
 tutory powers. The agreement was followed by a supplementary agreement,
 dated 5th May 1846, by which the parties resolved that the whole stipula-
 tions in their original agreement should be as fully binding on the Railway
 Company "as if each particular thereof had been inserted and enacted in the

bill, anything therein contained notwithstanding." Thereafter the two Acts were passed; the Harbour Act receiving the Royal assent on 14th May 1846, and the Act incorporating the Railway Company on 26th June 1846.

When the railway was projected to pass through Dumbartonshire, and terminate at Helensburgh in that county, it was of importance that the line should communicate with the harbour there, and that the harbour should be a commodious one. With this view the committee of management entered

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into a contract with the magistrates of Helensburgh, which contract proceeded on the narrative that the magistrates had resolved to execute and improve the harbour of Helensburgh, &c., and that the Railway Company had resolved to make a line of railway to the burgh of Helensburgh, and were desirous that, from the terminus thereof, rails should be laid to the present or any future quays. On this narrative it was declared that the magistrates, with the consent of the superior of the burgh, (which was a burgh of barony) approved of the company extending a line of rails from Dumbarton to Helensburgh, and laying rails from the terminus thereof to the quays in the manner and under the conditions and stipulations set forth in the deed of agreement. By the deed it was agreed that, upon the magistrates obtaining an Act of Parliament empowering them to erect a proposed quay and jetty, "they shall take the necessary measures for having the said quay and jetty completed at the expense of the said second party in manner after mentioned, and upon this being done, the said second party shall have liberty to lay rails as above mentioned." There then followed in the deed of agreement various provisions for the application of the rates and duties to be levied, and which were, *inter alia*, to be employed in paying the interest of a sum to be advanced by the Railway Company in payment of the expenses incurred in procuring plans, &c. in relation to the extension of the quay and harbour, and in procuring the Act of Parliament for liberty to erect the same; and also of the expenses of forming a harbour, &c. as the same should be fixed by the magistrates and the superior of the burgh, and the company's engineer, it being declared, "that the sum so expended, to the extent of L.3000, shall form a real burden on the said quay or quays, jetty or jetties, and harbour, and shall be paid and discharged from the dues or revenue to be enacted thereat, in manner before mentioned." It was also declared by the contract and deed of agreement, that "the said Railway Company and partners shall give the said first party their countenance and support in procuring an Act of Parliament for the erection of said quays and jetties, and in forwarding and carrying into execution the same." By the Harbour Act, the magistrates and others were appointed trustees to carry it into effect.

Subsequently to the passing of the respective Acts, communications passed between the pursuers and the Railway Company, with reference to executing part of the projected improvements; but difficulties arose, and at last, an arrangement was found impracticable, and the Railway Company denying the obligations contended for by the pursuers, the present action was raised for establishing and enforcing the same, as contained in the deed of agreement between them, and concluding against the Railway Company for payment of the sums which, in the deed of agreement, they had undertaken to advance.

The defenders have not made the line contemplated in the deed of agree-

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ment. They pleaded, *inter alia*, that it is incompetent for them, under their act of incorporation, to advance to the pursuers the sums concluded for in the summons, for the purposes therein set forth, in respect that these purposes are not contemplated by the Company's Acts. 2. That the defenders, as an incorporated company, are not bound to implement the agreement libelled on. 3. And that, at any rate, the obligations undertaken in favour of the Magistrates and Council of Helensburgh, are not binding, in respect that the conditions stipulated for in consideration thereof, were not duly fulfilled by the said Magistrates and Council, to the effect of obtaining powers to create a real lien over the harbour, and these obligations, consequently, cannot be enforced.

The Lord Ordinary (Cowan) repelled these pleas, and decerned in terms of the declaratory conclusions of the libel.

The defenders reclaimed.

N. C. Campbell, Macfarlane and the Lord Advocate for the reclaimers. There are here conclusions against the Railway Company for money to be paid by the Railway Company in terms of the agreement. That is a demand for a loan; not payment. This is a question which depends entirely on the statute. The statute gives no authority to lend money. This agreement also contemplated an application to Parliament, to get the requisite powers to give effect to it. But the Harbour Trustees have obtained no powers to create a real security over the harbour; therefore, the agreement is invalid, both because the Railway Company have no powers as incorporated to implement it, and the pursuers are not in a position to demand implement of it. E. 3. 3. 86; *Edwards v. Grand Junction Railway Company*, 1 Railway Cases, 173; *Saxshill Bridge Company v. Earl of Spenser, &c.*, 2 Maddox, 356 Vice Chancellor's Judgment, Jacob's Reports, 64.

Penney, and the *Solicitor-General*, for the respondents. There is here no obligation on the Company to enter into partnership or anything of that kind. It is merely to disburse money, which it is not impossible for a Railway Company to do. *Wordsworth* on Joint Stock Companies, 6 Ed. p. 515. *Shirely v. Birkenhead Railway Company*, 1 Railway Cases; *Lord Peters*, Ditto, 462; *Lord Howden v. Simpson*, 1 Railway Cases, 347; *Hawker v. Eastern Counties Railway*, "the Times" Newspaper, 16th Nov. 1852.

THE LORD PRESIDENT. This case raises two questions; 1st, as to the efficacy of the agreement that is come to by parties, before either of the Acts were passed; 2d, whether the terms of the agreement have been so followed out by the harbour trustees, that they are in a condition to give implement of their part of it. Now, upon both of these questions, I entertain considerable doubt; (1,) as to the validity of the agreement itself. I think that it is a sound principle that the committee of management could bind the subsequent company by anticipation in regard to matters which were properly matters, if they had been incorporated, they could have gone into: but not if they were matters altogether foreign to the purpose of the company, as, for example, if the company were to embark in a speculation of building a harbour, &c.; and the difficulty here is whether the agreement is, or is not of the character alleged. In regard to several of the matters contained in the agreement, there is no difficulty at all. They were truly within the competency of the committee of

management to deal with. But then there is a stipulation, a positive under-
 taking by the pursuers to obtain an Act of Parliament to make the harbour, and
 an undertaking to make it, and then there is a condition that the railway com-
 pany are to advance the expense of procuring estimates, &c., but they are to receive
 back £3000. It was on this part of the agreement that my difficulty arose, ^{Helensburgh}
 whether the railway company were not undertaking to make both a railway ^{Harbour}
 and a harbour. But I have come to be of opinion that there was not any in- ^{Trustees v.}
 competency in the matter, although there is certainly the closest thing to it. ^{Caledonian,}
 But I rather think that we are to regard it in this light, that there are here ^{&c. Rail. Co.}
 various things stipulated for that are important to the railway company, and
 which it was perfectly competent for the committee of management to stipulate
 for, and so to bind the company, and that the subsequent stipulations are merely
 in reference to the character of, and measure of the compensation to be given
 by the railway company, for the benefits secured to them. These stipulations
 that they are to make the harbour, &c., are in favour of the railway company,
 for they expected to derive advantage from the harbour being made; therefore,
 I think that it was an agreement which was legally binding in that respect on
 the corporate company. The second question is, have the pursuers here, the
 harbour trustees, fulfilled their part of the agreement; are they in a condition
 to implement their part of it? The money advanced by the railway company
 is to be made a real lien on the quays. How is this to be done? It has not
 been stated to us very clearly by the railway company, what it was they sti-
 pulated for, but I do not think it can be anything more than can be given by
 the harbour trustees now. The harbour trustees have power to contract debt
 on the quays, and, if so, although the Act of Parliament does not say this
 £3000 shall be a debt, I think it is thereby through the force of the Act of
 Parliament made a debt, and that that is of the substance of the agreement.
 Upon the whole, I think the interlocutor of the Lord Ordinary is sound.

LORD FULLERTON. This case is involved in very great difficulty. Now, one
 step we have got here, and it is a most important one. If the question had
 been only a question regarding a transaction entered into between this railway
 company and the harbour trustees, after the incorporation of the railway com-
 pany by statute, the point which would have arisen would have been, has any
 thing been done here beyond the powers of the railway company? But so far
 we are clear of that, for the rule has been laid down, that a provisional com-
 mittee may bargain and deal for the purpose of buying off opposition; and that
 may be binding on the company after the passing of the statute to a certain
 extent. So far we have got that original transaction as a lawful one.
 Now it is said that the agreement may be to a certain extent binding, but that
 what the railway company can be called on to do, is only what they may be
 called on to do under the statute itself. The powers of a committee of man-
 agement are limited. It is not quite in their option to deal with the funds as
 they might choose, and to give any man £50,000, and another a similar sum,
 and so on in order to buy off his opposition.

Now the point which arises here is, whether in this particular case it is not
 merely the payment of money the Railway Company have undertaken, but the
 payment of money for making the harbour, which would have been beyond their
 powers. Looking to the whole circumstances of the case, I think it is difficult

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to hold that they have gone beyond their powers. What the harbour trustees say, is, we shall get a statute for making the harbour, and we shall call on you, the Railway Company, to take this land and pass through the streets; in short, you shall so far make the harbour; but the reference to making the harbour is really the measure of the pecuniary obligation come under by the Railway Company. They have, thereby, bought off opposition, and now, after having got all that they require, they turn round and say we are not bound at all, just as if no such transaction had been entered into. Now this transaction can be fairly reduced into a money transaction, and I do not see how the Court should deal with a case of this kind in a different way from other money transactions entered into before the statute of incorporation was passed.

LORD CUNINGHAME. I am now satisfied that the pleas of the defenders against fulfilment of their obligation are neither consistent with law nor good faith. The objection taken by the defenders to fulfilment of the agreement, seems to be that it was a *pactum illicitum*, beyond the powers of the committee of railway projectors, who entered into it with the pursuers before the act was passed. To this, the short answer is, that the agreement was necessary and advantageous to the contemplated railway company, as, without it, they could neither have got their Act passed, nor made a profitable railway. If so, there is an end of the defence on all the authorities. It was perceived at an early period after railways were generally projected, that it was essential to the right formation of such associations, to give the acting provisional committees considerable discretionary powers, before the Acts were passed, which have been held binding on the company, and their funds after the acts were passed. Without such powers, the most improvident and impracticable provisions might be enacted or proposed,—and the most wasteful expense incurred in unnecessary and fruitless opposition. Hence, the precedents are numerous in which transactions *before the passing of Acts* have been sustained and enforced against statutory directors after their incorporation. This doctrine is well stated by Chambers and Paterson, late writers on railway law, p. 176. See also the case of *Sir Thomas Stanley v. The Chester and Birkenhead Railway Co.*, 8 Myl. and Cr. Reports, 773.

It was indeed argued that the present case differed from those quoted, in this, that the agreements related to the purchases of land, as appropriate and connected with the railway—and not to a foreign or extraneous object like the improvement of a harbour, which forms the subject of the present question, and was assimilated to a stipulation for endowing a Church, or building a cotton mill. This plea, however, is founded on a manifest fallacy. The defenders do not aver on record, that the harbour would have been an unsuitable and useless appendage to the railway, if that undertaking had been proceeded with and completed. No such averment is made. Nay, it is not even alleged that the railway could have been formed and worked to profit, without a harbour. By their principal Act, they always intended to form a branch railway from Dumbarton to Helensburgh; thereby meaning to the shore of that maritime village, on which perhaps 99 out of 100 visitors arrived, as they took their departure from it. What then would have been the use of a railway to the village without a commodious communication with the shore? The deepening of the harbour and the embankment of the pier leading to it, were as neces-

sary here as the erection of convenient *station houses*, and the usual costly apartments in other cases. The pier and harbour were indispensable partitions of the railway.

On the whole, therefore, I view the present as a case, where the pursuers seek implement of a legitimate agreement, which was beneficial and necessary for the railway, which was entered into by authorised parties for behoof of the defenders, and was recognised by the express sanction of the legislature in the Harbour Act, a few weeks afterwards. I cannot see that the defenders are entitled to repudiate such an agreement.

LORD IVORY. It is by the concurrence of these parties, and in reference to this agreement, that the Railway Bill was obtained. If the Railway had been to be continued to Helensburgh, which there seems to be a purpose on the part of the Railway Company not now to do, it is particularly clear that they could not have done this without purchasing from the Magistrates of Helensburgh, &c., the very advantages which this agreement purposes to give them. It is a case exactly similar in this respect to all the cases which have been referred to in England. It is within the object of their statute that this ground should be purchased, and the other privileges obtained. If the statute had been obtained without any previous agreement, is it not clear that under the statute they must have proceeded to treat with the Magistrates, &c., to gain that ground, and, therefore, if anticipating these difficulties, the committee of management interest the Harbour Trustees to concur with them and lend their interest to get the statute passed, can it be said that they have been treating about any thing that was unlawful or beyond their powers? If no agreement had been entered into they would have been compelled to treat with these parties, and to do so at perhaps a disadvantage. The Courts in England have laid down this principle, that they will not look in the face of these agreements to pick out flaws. They will only look to the extravagance of the sums given for land. In *Lord Peter's* case, which was an extreme one, his Lordship, who was partial to field sports, was held entitled to put a very large price on his ground as a hunting-ground, and it was held to be a fair bargain between him and the railway company, notwithstanding the objections that were taken to it. This brings the case to this, is the shape in which compensation has been bargained for sufficient to take it out of the rule? Suppose it necessary for the execution of the railway that a particular building be removed, it is absolutely necessary that the party from whom this will be taken should have a substitute for it. It would be legal to stipulate a large price for this. Would it be illegal to say, place us where we were before you interfered with us—we wish no gain—give us a new building. Is there anything illegal in that? And so with many other cases, taking as the measure of payment that which must be done to place the party in his original position. The fallacy of the argument for the Railway Company seems to be here, that they always look with a single eye to the provisions of their own statute, but they must look also to the other statute. The Harbour Trustees have power to execute their statute, and between the two there are ample provisions to do all that is to be done on their side.

Suppose the Railway Company had entered on these grounds at first, could they have afterwards turned round on the statute, and said, our statute does

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Dec. 2. 1852. not allow us to pay for them? The answer is, that is a matter of contract: payment is within your statute. That they have not executed the railway is their own fault. They were entitled to do so, but whether they are so now or not, they purchased the right of doing so, and had bound themselves by an irrevocable contract, in which I see nothing to vitiate it, in justice or in law. This brings me to the second part of the case. Both parties agree to support each other in going to Parliament for a statute. The Harbour Act is obtained by the corporation of the railway company; but independently of that, there is a supplementary agreement, containing a certain notification of the terms which are agreed to by all concerned. I think therefore that in the whole circumstances of the case, the Lord Ordinary's judgment is right. In the Harbour Act there is power to borrow money, and as the agreement stands it appears that the railway company are parties to pay the cost; but at all events, to a certain extent, and in regard to this, the harbour trustees are in a condition to implement their part of the agreement. On both branches of the case therefore, although not without a certain difficulty, I have a very decided conviction that as regards the justice and good faith of the case, it is entirely in favour of the trustees, and the authorities allow the Court to deal with it as now proposed.

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The Court therefore "Refuse the prayer of the reclaiming note, adhere to the interlocutor of the Lord Ordinary reclaimed against: Remit to his Lordship to proceed farther in the cause as shall be just, and reserve all questions as to expenses of process."

Thomas Sprot, W.S., Reclaimers' Agent.

Tawse and Bonar, W.S., Respondents' Agents.

(J. S. M.)

No. 46.

MEIKLAM'S TRUSTEES v. MEIKLAMs.

Husband and Wife—Marriage Contract—Trust—Provisions to Children—Trust Settlement—Balance of Trust-funds—Heritage—Moveables.—By antenuptial contract of marriage, A. bound himself to pay a sum of £30,000 into the hands of trustees, to be held by them, *inter alia*, for payment of a jointure to his widow, and of provisions to the amount of £20,000 to the children of the marriage. If the sum so paid by him should prove insufficient, after payment of the annuity, to pay the provisions to the children, A. bound himself to make up the deficiency; and if there should be ample funds for payment of the jointure, and to secure the provisions to the children, the trustees were directed to pay the surplus annual proceeds to him. In implement of this obligation, A. transferred to the trustees an heritable bond for £40,000; and of this sum, when the bond was paid up, the trustees re-invested £30,000 in heritable security. By deed of settlement, A. conveyed to his trustees all his heritable estate, and to his widow all his moveable estate, at the time of his death. He predeceased his widow, and, on her death, after payment of the provisions to the children, there remained a balance of the sum in the hands of the marriage-trustees of £10,000. This balance was claimed by A.'s trustees as heritage, and by the widow's trustees as moveable. *Held*, that the character of the trust was not affected by the nature of the investment; that the trust was not for A.'s behoof, but that his interest in it was contingent merely, and that the balance of £10,000 was moveable, and therefore belonged to the widow's trustees.

1st Division.
Dec. 2. 1852.

Meiklam's
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Meiklams.

By antenuptial contract of marriage entered into between the late Robert Meiklam, Esq., and Miss Christian Alston Buchanan, Robert Meiklam bound himself to pay within six months after the marriage the sum of L.30,000, to

certain trustees under the contract of marriage for the purposes therein mentioned. (1.) They were directed to pay to Meiklam during his lifetime the whole interest and annual profits; (2.) After Meiklam's death to pay his widow an annuity of L.800, with L.400 for mourning and aliment; (3.) In the event of there being funds sufficient for the purpose after providing for the jointure, to pay to the children of the marriage L.20,000 in the proportions therein mentioned; and, (4.) The trustees are bound, *inter alia*, to pay and make over to Robert Meiklam and his successors, such part of the L.30,000 as might not be required for the trust purposes; and in the event of this sum proving insufficient for the provision to his children, the trustees are to pay to his child or children such a sum as would be sufficient to pay their provision in full. In implement of the obligations contained in the marriage contract, Meiklam, instead of paying the sum of L.30,000 to the trustees, assigned to them an heritable bond and disposition in security in which he was infest. The trustees were infest on this disposition and assignment. Thereafter, the security for L.40,000 was paid up, and a discharge granted by the trustees, and by Meiklam as truster. Of this sum L.30,000 was deposited by the trustees in bank, and afterwards re-invested in heritable securities in their favour.

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Robert Meiklam died in 1847; he was survived by his widow and a son and two daughters. In 1849 Mrs Meiklam also died.

In 1841 Meiklam executed a trust-disposition and settlement, and afterwards a codicil in 1847, which it was declared by decree of the Court of Session in 1849 validly conveyed to the trustees under the marriage settlement the heritable estate, and to Mrs Meiklam the whole moveable estate which belonged to the truster at his death. The sum of L.30,000 was not more than sufficient during the lives of the parties to answer the purposes of the trust; but since Mrs Meiklam's death, no more of the trust-funds were required than what was necessary to pay the provision of L.20,000 to the children of the marriage, and the sum of L.400 for mournings and aliment to Mrs Meiklam, and which not having been paid to her, remained a debt due to her executors. The balance of L.10,000 is now claimed on the one hand by Mr Meiklam's trustees under his trust-disposition and settlement, on the ground that Mr Meiklam enjoyed a reversionary right in the heritable securities held by the trustees under the marriage contract; and that so far as regards his succession that right is heritable, and therefore belongs to them; and on the other hand, by Mrs Meiklam's trustees, as forming a portion of the moveable succession of Mr Meiklam, to which his wife had right under the testamentary deeds.

The marriage trustees, as holders of the fund, raised a multipointing, in which the claimants were called as parties.

The Lord Ordinary (Ivory) "finds that the fund *in medio* falls in the succession of the late Robert Meiklam to be considered and dealt with as moveable estate, and therefore repels the claim of the said Robert Meiklam's trustees, and ranks and prefers the trustees of the late Mrs Meiklam as having sole and exclusive right to the said fund."

In the note appended to his interlocutor his Lordship remarked,—

The marriage trustees were here *creditors* of Mr Meiklam under the personal

Dec. 2. 1852. obligation contained in the marriage-contract, whereby he binds himself, for the purposes of the marriage, "to content and pay the sum of L.30,000." That this was, *prima instantia*, a purely personal obligation is not to be disputed, and had Mr Meiklam died without implementing it, it would have been his personal representatives who must have paid it. The trust, as originated therefore, and in its primary constitution, was a trust of moveable estate. All after this, was, more or less, but an accident in the course of administration. Even there, however, the powers of the marriage trustees were absolute. They were authorised to invest, but (except in one instance, viz. of Mr Meiklam's purchasing land, and himself becoming the borrower—an event which did not occur,) they were equally free to invest upon personal as upon heritable securities, while Mr Meiklam had no voice or controul in the matter. Then as to all the purposes of the trust, they were purposes of "*payment*," and of payment to be made "out of the foresaid sum of L.30,000." In a certain event, as, for example, had Mrs Meiklam survived for a long period of years, there never might have been any surplus to come to Mr Meiklam, and accordingly with reference to that very case he supplements the obligation in the marriage-contract by another, still *personal* in its character,—"*to pay* to his said child or children such a sum as will be sufficient to pay their said provisions in full." While as a counterpart to this, it is provided, that "if by any contingency the said trust-funds shall be more than sufficient to answer the said trust purposes, the said trustees or trustee shall be bound and obliged to pay and make over to the said Robert Meiklam and his afore-said such part of the said trust-funds as may not be required for the trust purposes." Had occasion for such a claim arisen in Mr Meiklam's lifetime, his right would seem to have been of the nature of a mere *jus actionis* for so much money. And now that it has emerged on his death, the character of the demand on the part of his trustees must be of the same character.

It was strongly urged that the fund placed under trust was *radically* the proper estate of Mr Meiklam, and that the trust was but a burden upon that estate, and therefore a trust *for behoof of Mr Meiklam himself*, in so far as the fund might not be required for the other trust purposes. Had it been so, there might have been more of plausibility in maintaining that any form of investment that was made with Mr Meiklam's knowledge and approval was, as in other cases of instruction or adoption, substantially his own act in reference to property entirely and exclusively his own. The Lord Ordinary, however, cannot hold this to be a correct legal view of the case. The marriage-contract originally placed him in the relation of *debtor for the fund*, and when he paid this debt, the fund became, in the hands of the trustees, the estate generally of those who were interested in the provisions of the contract. Mr Meiklam was no doubt one of these, though only contingently so. But it would be going too far if, upon this account alone, he were to be held, in the sense contended for by his trustees, the radical proprietor of the fund, dealing with the trust merely as a burden.

Mr Meiklam's trustees reclaimed.

W. Ivory, Maitland and Deas, for the reclaimers. The sum of £10,000—the balance of the sum of £30,000—was a fund in which the children of the

marriage never had and never could have any interest whatever. The only purpose for which the trustees held it was for the security of the widow alone. This sum, therefore, is vested in them in trust to meet temporary burdens; but the ultimate fee belongs to Mr Meiklam himself. It does not affect its character that he has given to third parties a discretion to decide whether it should be invested in heritable or moveable security. It is still heritable or moveable in his person. Therefore it must be regarded as a sum held all along substantially for his behoof; for although contingencies no doubt might arise to carry it away, that does not affect it as in a question with them so far as his interest in it may be concerned. *Burrell v. Burrell*, 14th Dec. 1825, 14 S.

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E. S. Gordon and the Solicitor-General, for Mrs Meiklam's trustees.

THE LORD PRESIDENT. The interlocutor is right. This was a money obligation, and the trustees were to hold the money for certain purposes. They were trustees for purposes prescribed by the marriage-contract, but not trustees merely for Mr Meiklam. Now the fact of this having been heritable at the time it was handed over to the trustees does not affect the question. It was given to them to deal with it as they might deem proper. Meiklam has only a contingent interest in it. It was an accident its being heritably invested at the time of his death. The cases cited do not bear on this matter. It comes to the same thing as if the money had been given to the trustees and they had been dealing with it as fulfilling the purposes of the trust, and upon that view Meiklam's claim as to the reversion, if there should be a reversion, is no better than any other person's. Therefore the sum is to be dealt with as moveable and not as heritage.

LORD FULLERTON. I am of the same opinion. There are always difficulties in cases of this kind, for it depends entirely on the terms of the transaction; and looking to the terms of this transaction, I have no doubt that this must be looked at as moveable fund. If the trustees, for their own satisfaction, choose to invest this in heritable security, that does not affect the character of the right so far as concerns the succession of the party, and, therefore, I am clear that the right is, in its nature, from the beginning, personal, and that nothing has been done since the original constitution of the right to destroy its character of personality.

LORD CUNINGHAME. I have had no doubt as to this case since I first perused the record, which satisfied me that the interlocutor under review was the only one that could be pronounced without an entire subversion of the law, as it has been long understood and recognised in the class of cases to which the present properly belongs. The question arises out of a trust constituted by a marriage-contract for behoof of a wife and children. The fund in dispute was vested in trust, as though to provide for the conventional and contingent claims of wife and children. The father had a *power of division*, and failing that, the children were to be *equal* beneficiaries in the funds. This also was the situation of the trust at the death of the truster; and the question is, what was the legal denomination of the trust fund at that period? In particular, was it *heritable* or *moveable* in a question with the successors of the truster? On that point, I conceive it to be now too late to entertain any doubt. Looking to the series

Dec. 2 1852. of cases, such as, among others, *Ramsay v. Grierson* in 1780, (Dict. 759): *Douglas* in 1796, (Dict. 792): *Angus*, 6th Dec. 1825; and *Kyle*, 14th Nov. 1827; in all of which, although the trust-estates comprehended much heritage, vested in trustees, it has been uniformly found that the interest of the beneficiaries in the whole property was *moveable*, attachable by *arrestment*, and descendible to *executors*. It seems to me that this is a question foreclosed and finally settled in law. I can draw no distinction between the trust here, and a trust embracing the whole property, heritable and moveable, of a truster, whether by testamentary settlement, or by a trust to creditors in insolvency, or by trust conveyances on various occasions, where a party contemplates the permanent divestiture of his estate, and an investment in trustees, for behoof of and division among third parties. At the same time, although the general rule is, that these trusts operate as a conversion of the whole fiduciary estate into personal property, there are certainly exceptions, where it has been found that the legal character of the different subjects held by the truster is not changed by the execution of such trusts. *Cathcart*, 26th May 1830; *Burrell*, 14th Dec. 1825; *Speirs of Elderslie*, 21st Nov. 1850. There is nothing, however, to bring the present case within the latter category; and, therefore, it falls within the ordinary rule, and the interlocutor of the Lord Ordinary is clearly well founded.

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LORD IVORY adhered to his opinion as Lord Ordinary.

The COURT, therefore, "adhere to the Lord Ordinary's interlocutor submitted to review, and refuse the note, but find no expenses due."

Gibson-Craig, Dalziel, and Brodie, W.S., Agents for Mrs Meiklam's Trustees.
MacLachlan and Ivory, W.S., Agents for Reclaimers. (J. S. M.)

No. 47. ROBERT SHAW ANDREW AND OTHERS v. SIR JAMES COLQUHOUN.

Suspension—Decree of Removing—Juratory Caution.—Circumstances in which the Court passed a note of suspension of a decree of removing on juratory caution, and in which the oath of one of the curators of a minor was received in implement of a juratory caution.

1st Division. This was a suspension of a decree of removing on juratory caution. In Dec. 2. 1852. 1825 the late John Andrew entered into possession of certain property belonging to the late Sir James Colquhoun of Luss, father of the respondent. Andrew was succeeded by his sons, James Andrew, and Dr John Andrew, and against them the respondent in 1841 brought an action of removing, on the Act of Sederunt of 14th December 1756. Defences were lodged, in which it was alleged that the defender was in possession on a lease granted by the late Sir James Colquhoun to John Andrew for twice nineteen years. This action, however, was allowed to fall asleep. Dr John Andrew, one of the defenders, is now represented by the complainer, Robert Shaw Andrew; and against the complainer, the respondent in 1849 brought an action of wakening and transference of the original action against Dr John Andrew, and James Andrew. After a variety of procedure, the Sheriff-substitute pronounced an interlocutor, finding that the defenders had failed to establish their defence; and "that in the absence of evidence of the alleged lease, the defenders must be held to be merely tenants at will of said premises, and removeable accordingly at the pleasure of their landlord." The Sheriff declined

Andrew, &c.,
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judging in the case. A charge being threatened under this interlocutor, a note of suspension of the decret was presented on the ground of certain alleged irregular and incompetent proceedings on the part of the Sheriff-substitute. The note was presented without caution, or on caution, if found necessary. Caution had been found in the Sheriff Court by the defenders in the original action for violent profits, but the cautioner was now dead, and caution of new was ordered to be found. By supplementary note the suspenders converted the note of suspension into a note on juratory caution. To this supplementary note the respondents lodged answers denying the competency of passing the note of suspension except upon good and sufficient caution, in terms of the Act of Sederunt 1756, § 6, and also founding upon the Acts 1 and 2 Vict., cap. 86, § 4, and the Act of Sederunt 1838, § 4. Dec. 2. 1852.
Andrew, &c.,
v. Colquhoun.

The Lord Ordinary on the Bills, (Cuninghame) reported the case in June 1852, "chiefly from the doubt that he had as to the competency of a suspension of a decree of removing on juratory caution." . . . His Lordship considered, that although the terms of the Act of Sederunt of 1756 were express, "it would be hard to lay it down that this excludes *juratory* caution in all cases where a poor man can offer nothing else, though, in the absence of precedents, the Lord Ordinary thinks that, in the first instance, this should be determined by the Court."

The Court held, (17th June 1852,) that the proceeding was complete, and, accordingly, in the special circumstances of the case, passed the note on juratory caution.

To-day the case was again reported by LORD CURRIEHILL. The respondents having given notice to the complainers that they would apply on a certain day to the Clerk of the Bills for a certificate of no caution having been found by the suspenders, a note was lodged by them stating that they were willing to find caution, but that there was a difficulty as to which of the complainers should take the oath. Robert Shaw Andrew is a seaman and abroad, and, consequently, cannot do so till his return to this country; and no remit having been made to any Judge to take the oath of the complainers, they are, therefore, not in a position to comply with the Act of Sederunt. They therefore craved the Lord Ordinary to prohibit the Clerk of the Bills issuing any certificate of no caution.

The respondents lodged answers, to the effect, that as no steps had been taken by the suspenders to implement their offer of juratory caution, and as ample time had been allowed them for doing so, the certificate should be granted.

Pyper for the respondents now stated that they would be content with the oath of one of the curators of Robert Shaw Andrew, and of James Andrew, the other suspender.

The Court remitted to the Lord Ordinary to proceed accordingly.

David Crawford, S.S.C., Complainers' Agent.

Taurse and Bonar, W.S., Respondent's Agents.

(J. S. M.)

No. 48.

GRAHAM v. SCOTT.

Relevancy—Sale—Reduction of.—Averments which were held not relevant and sufficient to support conclusions to have a sale reduced, and the price repeated.

2d Division.

Dec. 2. 1852.

Graham v.
Scott.

This was an action at the instance of Patrick Graham, Esq., W.S., against James Scott, Esq., merchant in Glasgow, concluding for reduction of the sale of certain railway shares sold to the pursuer by the defender in September 1845, repetition of the price, and of the calls which had been paid by the pursuer.

The Lord Ordinary (Anderson) reported the case to the Court on the question of the relevancy and sufficiency of the pursuer's averments. These averments were to the effect, that in 1845, the pursuers and certain others interested in the promotion of the "Glasgow, Barrhead, and Neilston direct Railway," were anxious to secure a sufficient number of shares to give them the control of the Company, and in particular, to prevent it from falling into the hands of the "Glasgow, Kilmarnock, and Ayr Railway Company," at a general meeting soon to take place. That they employed Mr Graham of Feroneze to purchase for them 2500 shares of the Barrhead line (then in scrip) from the defender, who had represented himself as possessing upwards of 3000 shares, that being a number sufficient to turn the scale against them, and that he was in treaty with their enemies, the Ayr line, for the sale of these shares. That, accordingly, Mr Graham of Feroneze made the purchase, and the memorandum of agreement was signed by him and two others, acting for themselves, the pursuer, and other parties. That it was further agreed, that the defender should hold other 500 shares, so that they should not be used against the pursuer and his friends. That the statement by the defender, that he possessed above 3000 shares, turned out to be false, and was fraudulently made in order to induce the pursuer and his friends to make the purchase at a high price, while, in reality, it was unnecessary for their object. That the defender had also failed to retain the 500 shares, having sold them soon after. Lastly, That among fifty supposed Barrhead shares which fell to the share of the pursuer himself, there were found, when they came to be registered, ten of the Ardrossan Company. In regard to these ten shares, there was an alternative conclusion for repetition of the sum effeiring to the ten Barrheads, which ought to have been in their place.

Various letters were produced, which showed that the pursuer had frequently requested the defender to pay him the value of the ten missing Barrheads, and that he declined to do so, offering then to deliver the shares themselves.

G. Young, with whom *Deas*, for the pursuer, attempted to show that these averments were relevant, and sufficient to support the conclusions. An extensive transaction was here libelled, which would not have been gone into by the pursuer and his friends, but for the false statement of the defender, which was made for the purpose of inducing it. It was of no importance that the pursuer alone was insisting on his remedy. The defender knew that he was one of the purchasers, and he took his risk of any one of them objecting to the validity of the sale. It was not like a transaction by *pro indiviso* proprietors of heritage, who could not act independently.

T. Mackenzie, with whom *Penney*, appeared for the defender.

The LORD JUSTICE-CLERK observed, that though this was a question of relevancy, it was closely connected with the merits, at least as disclosed by the pursuer himself in his record. Now, he could not discover that any injury had been averred by the pursuer. It was nowhere stated that the object of the purchase, viz., the obtaining the command of the company, had been defeated. The contrary was admitted to be the case. Even if he had averred injury he had still this difficulty to contend with, that he was appropriating the whole of this injury to himself, while it equally applied to all the other purchasers. If the sale was reducible *quoad* him, it was reducible altogether, for it was one transaction. By his own showing, he had shifted his ground, for there was evidently no challenge of the general sale till 1850, when this action was raised, five years after the transaction. In the interim, many communications seemed to have passed, but they all referred to the matter of the ten Ardrossan shares, and did not contain a single allusion to a reduction of the general sale, or to any fraud on the part of the seller. In regard to the matter of the ten shares, it appeared that the defender had repeatedly offered to replace them by the ten Barrheads, which the pursuer originally bargained for, but that he rejected the offer. He had not stated that any object had been defeated by the want of the ten shares. On the whole, the averments were obviously insufficient to support any of the conclusions.

Graham v.
Scott.

LORD COCKBURN concurred, on the same grounds.

LORD MURRAY also concurred. No doubt, fraud was averred. But it was necessary to state the facts from which the fraud was to be inferred. The statements were more like misrepresentation than fraud. The pursuer might have complained of this as soon as discovered, but he goes on, apparently contented, and acquiescing for a long time; and what was important, the written contract did not contain the alleged misrepresentation, and the inducing motive did not therefore constitute part of the transaction. As to the ten shares, it was strange that it was not discovered at first, but this only proves that no injury had resulted from the mistake, and, indeed, no injury was condescended on in connection either with this, or with the more general branch of the case.

LORD WOOD concurred.

The COURT pronounced an interlocutor, finding "That the pursuer has not set forth in the record and in the documents to which he refers, a case relevant and sufficient in law to infer the reductive conclusions, and the petitory conclusions of this action; therefore dismiss the action, and decern."

Walter Horsburgh, W.S., Pursuer's Agent.

W. A. G. and R. Ellis, W.S., Defender's Agents. (W. H. T.)

MÜLLER v. ROBERTSON AND OTHERS.

No. 49.

Damages—Relevancy.—Averments by a pursuer, in an action of damages for libel, which were held relevant to be made the subject of an issue.

This was an action at the instance of Dr Müller against Dr W. Robertson, Professor Christison, Professor Syme, and others, conductors of the "Monthly Journal of Medical Science," concluding for damages on account of a letter signed by Professor Syme, which had appeared in the Journal, and which contained the two following paragraphs :—

2d Division.
Dec. 2. 1852.

Müller v.
Robertson, &c.

Dec. 2. 1852. "You say 'a fierce paper war has arisen between the two Edinburgh professors, Syme and Lizars,' but you must, or at least ought to know, that I have not addressed a single word on the subject in question to the so-called professor," regarding him as long placed beyond the pale of professional respect and courtesy."

Müller v.
Robertson, &c.

"In estimating the value of my operation, you proceed upon the supposition that the averments of Mr Lizars, and his assistant, Dr Müller, are well founded; but, in fairness to your readers, if not to myself, should have mentioned that the statements of these persons, in so far as they attribute bad effects to the operations which I have performed for the remedy of stricture by division, have been declared by me to be all utterly devoid of truth."

After averring that these statements were false, calumnious, and injurious, &c., as regards Mr Lizars, the pursuer in his condescendence went on to say, "and the said statements are farther false, calumnious, and directly injurious to the pursuer, as they were intended to represent, and do falsely and calumniously represent the pursuer as the intimate friend, assistant, and associate of the said John Lizars, described and characterised as aforesaid, and as united with him in joint medical undertakings, and in the propagation of false statements regarding diseases and medical operations, for selfish ends and purposes of their own; and the said statements, so far as they relate to the pursuer directly, are false, calumnious, and injurious, and were intended to represent, and do falsely, calumniously, and injuriously represent the pursuer as a culpable propagator of falsehood, and false statements regarding medical facts, and diseases of the greatest importance to the health and lives of individuals, all to the great injury and damage of the pursuer."

"The said statements, both as they relate to the pursuer in conjunction with the said John Lizars, and to himself directly and personally, are highly injurious to his feelings, and calculated to inflict the deepest injury upon him in his professional character and reputation, and thereby to ruin his practice and prospects in life, and to deprive him of all estimation, confidence and respect, either as a professional man, or a member of society. The pursuer has already suffered great damage in consequence of the said injurious libel, and the defenders are bound to him in reparation."

An issue was proposed by the pursuer, exactly corresponding to these statements in his record.

The Lord Ordinary (Wood), found, *inter alia*, "that no relevant ground is set forth in the summons to support the conclusions of the action; therefore, refuses to allow the proposed issue, and assoilzies the defenders, and decerns."

His Lordship, in a note, remarked that the words in the letter founded on, did not, in his opinion, contain actionable matter, in so far as mention was therein made of the pursuer. That there were no facts set forth, extrinsic of the words in the letter themselves, by reference to which, and the appropriate *inuen-do*, the meaning of the words was to be explained. Both the statement and the proposed issue, shewed that there was no secret meaning to be explained or exposed, different from the plain and direct meaning of the words themselves. Their meaning therefore could not be extended, and it was for the Court to determine what that meaning was. Any other and wider meaning which might be suggested in the record or issue, if unsupported by alleged

facts, (though actionable in itself), could not be at once accepted to the effect of rendering the action relevant. Dec. 2. 1852.

The pursuer reclaimed.

Muller v.
Robertson, &c.

Buchanan, for the pursuer, contended, that to explain the meaning of the words alleged to be libellous was not within the province of the Court; unless in extreme cases, where it was perfectly clear at a glance that the words were not actionable, that question belonged to the jury. In the present case the words were, he maintained, clearly actionable, and even if the Court should consider this not self-evident, they were at least sufficiently ambiguous to render their meaning a proper inquiry for a jury, and not for the Court. See *Fairford*, Jan. 1837, vol. i. of *English Jurist*, and *Lord Denman's* opinion therein.

The Solicitor-General, for the defenders, maintained that the pursuer had shewn no title, and made no relevant averments. The only words relating to him, were, "and his assistant Dr Müller." On this minute foundation he had heaped numerous *invidios*. No doubt, apparently innocent words might be actionable, but something must be stated explaining how they became so, and facts averred, which, if true, would prove them to bear a different meaning from the actual one. There were no such facts or explanations in this record. *Starkie on Libel*, I. p. 8.

THE LORD JUSTICE-CLERK. Under the Jury Acts, I fear we cannot throw out this action. The pursuer is not said in the letter to be merely the pupil and surgical assistant of Mr Lizars, but its meaning seems to be, that he was his colleague in the medical warfare in question. I can hardly conceive any case of the nature of the present, unless some very rare and exceptional one, in which it would be competent for the Court to dismiss the action.

LORD COCKBURN concurred, observing that the pursuer undertook to prove the fact that certain words had a certain obvious meaning; he might fail to do so, but he was entitled to try it. This was not a proper case of *invidio*, but a question of the direct tendency and effect of certain expressions.

LORD MURRAY thought the case not free from difficulty, but considered it their duty to allow doubtful cases to go to a jury.

LORD WOOD did not understand their Lordships to lay it down that no case could occur so obviously *non-libellous* that the Court could throw it out on the pursuer's statement. But, perhaps, it would be unwise to withhold the present case from a jury.

The COURT pronounced the following interlocutor:—"Alter the said interlocutor, and find that the summons contains relevant matter to be made the subject of an issue, and continue the cause for the consideration of the issue proposed by the pursuer."

J. Cullen, W.S., Pursuer's Agent.

Smith and Kinnear, W.S., Defenders' Agents.

(W. H. T.)

SHIELDS v. SHIELDS OR BEATTIE.

• No. 50.

Jurisdiction—Divorce.—Held that the Court had jurisdiction in an action of divorce, on the ground of adultery, though the pursuer was resident in America, and had not been in

Scotland for four years, the original domicile of both parties, the marriage, the alleged adultery, and the present residence of the defender, being all Scottish.

Dec. 2. 1852.

Shields v.
Shields or
Beattie.

This was an action of divorce on the ground of adultery, at the instance of a husband against his wife. The parties were originally domiciled, and were married in Scotland. In 1848 the pursuer went to New York, leaving his wife behind him, and it was admitted that he was now resident there, in business as a machine maker. The action proceeded on the allegation of acts of adultery committed by the defender, in Scotland, since her husband left her.

The defence of no jurisdiction having been pleaded, the case was reported by the Lord Ordinary, (Rutherford).

Pattison and *Moncreiff*, maintained for the defender, that she could not be convened in the Scotch Courts, in respect, that her husband had lost his Scottish domicile, having gone to New York in 1848, and settled there in business, where he still was, and leaving nothing behind him in Scotland, except his wife, with whom he had quarrelled. His domicile, therefore, being American, and the wife's domicile following that of the husband, the Court of Session had no jurisdiction in this cause. The law must follow its own presumption, as in the well-known case of *Warrender*, in which it was found sufficient for the husband, who was resident here, to cite his wife edictally, she being on the continent, (see Lord Brougham's opinion in that case, *Shaw* and *M'Lean*, vol. ii., p. 192). In the present case the converse must hold. At all events, the pursuer ought to have come and resided here for forty days; *Forrester*, 18th July 1844. In the case of *Shaw*, (Outer House, 1850), which the Lord Ordinary had ordered to be printed and boxed to the Court along with the papers in the present case, the pursuer was in Egypt, and a proof had been ordered as to his residence there being permanent or temporary, shewing that the Lord Ordinary, (Ivory), in that case, held that there was no jurisdiction here, if he was absent *animo remanendi*. See also *Bennie*, 30th June 1849, 11 D. 1211.

Duncan and *Deas*, for the pursuer, argued, that even assuming that the pursuer has lost his domicile in this country, there is still ground for holding that the defender is subject to the jurisdiction of the Scotch Courts. This ground of jurisdiction arises from the circumstances, that Scotland is the alleged *locus* of the adultery, and that personal service of the summons was made upon the defender. All that is proved by the case of *Warrender* is, that in actions of divorce at the instance of the husband, he *may*, in all cases, sue his wife within his own *bona fide* domicile of residence. But there is no doctrine in that case to establish the principle, that in no circumstances can the husband sue his wife out of this forum. In point of fact, the wife has been repeatedly sued in actions of divorce out of her husband's *bona fide* domicile of residence. This occurred in the case of *Forrester*, 18th June 1844, 6 D. 1358, and *Christian*, 14th June 1851, 13 D. 1149. In this latter case, the more unfavourable for the pursuer, the parties were English, and the contract English. Scotland, however, was the *locus delicti*, and personal citation was given to the wife. Another circumstance certainly did occur in both these cases which is wanting in the present, viz., residence for forty days by the pursuer in Scotland before raising the action. But on the authority of the

ruling case of *Kinger v. Churchill*, 15th Jan. 1840, 2 D. 307, such residence of forty days by the husband is of no efficacy whatever to impart jurisdiction *passivi* to his wife. Hence, stripping these two cases of this useless adjunct of forty days, we are led irresistibly to the conclusion that the *locus delicti* combined with personal citation of the defender, are sufficient of themselves to found jurisdiction as against the wife in an action against her for divorce at the instance of her husband. In the present case these two elements combine, and therefore the jurisdiction of the Court is good.

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The LORD JUSTICE-CLERK observed, that this was a case the decision of which must necessarily rest upon general principle. It might prove very difficult to decide the question of the pursuer having lost, or still retaining, his Scottish domicile, on the ground of *animus remanendi*, especially so long as he was alive, as his views might fluctuate from time to time, according to his success and other circumstances. But, fortunately, it was unnecessary to enter upon that question. The question was, had the Court, apart from that question, sufficient grounds for sustaining its own jurisdiction over this defender in a question of divorce? The parties were originally Scottish, the marriage (that contract of which the violation was now the ground of action) had been entered into in Scotland, and in reference to the law of Scotland, and the alleged violation of it had taken place here. The defender was here in person, and had been personally cited. Why should she not be held answerable in these circumstances to the Scottish Courts? Hardship she could not plead; for if innocent, it was here that she could best prove her innocence. She had said—"To my own inconvenience I ought to be cited to the pursuer's foreign forum."

The import of the case of *Warrender* had been mistaken by the defender. The proposition that the pursuer, in that case, had a right to cite his wife in the Courts of this country, she being abroad, was not correlative to, and did not imply the converse proposition, that if he had been abroad and *she here*, he must (irrespective of other circumstances) have convened her in the Courts of the country where he himself was, and in no other. All that it proved was, that the fiction of law that the wife follows her husband's domicile, was available to him, and prevented his being shut out from pursuing her here. In the present case, the husband's prerogative entitled him to sue his wife *in foro delicti*, joined with the facts, that it was also the place of the contract and the place of the wife's actual presence.

His Lordship did not wish to give any opinion upon the exact effect of forty days' residence. In the cases on this point, it was difficult to trace any consistent general principle. A forty days' residence might confer a right upon absolute strangers, but he did not think that the present pursuer would have bettered his case by it.

LORD COCKBURN was of opinion that the defender was wrong in both of her pleas,—1st, That the pursuer had lost his Scottish domicile. That proposition she had not made out; no *animus remanendi* had been proved. The husband had been absent only four years, was still alive, and protested against it. 2d, "That the wife's domicile follows that of the husband *universally*." If that were held, a husband might oblige his wife to follow him to any tribunal, however barbarous, where he might choose to take up his abode, for

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alleged infidelity while living separate from him in this country. He had seldom seen so many of the deepest foundations of jurisdiction combined as in this case. The original domicile, the marriage, the adultery, and the present abode of the wife were all Scottish. As to forty days' residence by the husband, it would have been an idle and useless ceremony.

LORD MURRAY concurred, especially in the small significance of the forty days. This was not a question of *domicile*, but of *forum*, a very different matter, though sometimes the former might be an important element in determining the latter. The duty of the Court was to sustain its own forum, if it thought that no other Court could better and more conveniently adjudicate on the rights of the parties. Such was clearly the case here. His Lordship then referred to Lord Brougham's remarks in the well-known case of *Lolly, Russ. and Ryan*, C. C. 237.

LORD WOOD concurred.

The COURT therefore intimated their unanimous opinion, that the plea of want of jurisdiction should be repelled, and the Lord Ordinary pronounced the following interlocutor. "The Lord Ordinary having advised with the Lords of the Second Division of the Court, sustains the jurisdiction, repels the preliminary defences, finds the libel relevant, and grants commission to the British Consul at New York, whom failing, to the mayor of New York, to take the oath *de calumnia* of the pursuer in the usual form, of which appoints the clerk of this process to grant certificate, and appoints forty-eight hours' notice to be given to the defender, or her known agent in New York, if any, of the time and place where such examination is to take place; and in respect the defender intimates that upon such occasion she may put cross interrogatories, instructs the commissioner to allow no cross interrogatories, unless such as shall be specially authorised by the Court, with reference to this commission."

J. and J. Macandrew, S.S.C., Pursuer's Agents.

James Bell, Solicitor, Defender's Agent.

(W. H. T.)

No. 51.

BARCLAY AND ORR v. LANDSBOROUGH.

8 & 9 Vict. c. 83, sec. 47—*Poors' Assessment—Ministers' Stipend*.—The stipend of a minister of the Free Church, paid out of the Sustentation Fund of the Free Church, is assessable for poors' rates levied on means and substance in the parish in which he resides, and not in the parish of the church in which he officiates.

1st Division.

Dec. 3. 1852.

Barclay and
Orr v. Lands-
borough.

This was a suspension and interdict against the Inspector of the Poor and the Collector of Poors' Rates of the parish of Stevenston, at the instance of the Minister of the Free Church in the parish of Stevenston. The question arose on the construction of sec. 47 of the New Poor Law Amendment Act, which enacts as follows:—"That if in any parish or combination in which an assessment is proposed on means and substance, any company or any individual shall occupy any lands and heritages, or shall carry on any trade or business in any premises within such parish or combination, such company, and the partners thereof, and such individual, shall be liable to be assessed in such parish or combination on their or his means and substance derived from

or relating to such occupancy, trade, or business, although none of the partners Dec. 8. 1852. of such company, nor such individual, should be actually resident in such parish or combination; and such company and partners, and such individual, ^{Barclay and Orr v. Landsborough.} shall not be liable to be assessed on the same means and substance in any other parish or combination; and if any person shall be assessed in any parish or combination upon his means and substance other than means and substance derived from or relating to the occupancy of lands and heritages within such parish or combination, or the carrying on of trade or business in premises within such parish or combination, such person shall not be assessed upon the same means and substance in any other parish or combination; and if any person shall reside in and be liable to be assessed as an inhabitant of more than one parish, it shall be optional to such person to determine in which of such parishes he shall be assessed on his means and substance, other than means and substance derived from and relating to the occupancy of lands and heritages, or the carrying on of trade or business in premises within any particular parish."

The suspender resides in the parish of Ardrossan. The members of his congregation are admittedly resident partly in the parish of Ardrossan, partly in that of Stevenston, and partly in the neighbouring parish of Kilwinning. The stipend of the suspender is paid by an allowance from the Sustentation Fund of the Free Church. He does not receive any part of the seat-rents, or of the money collected at the church door.

The assessment for the poor in the parish of Ardrossan is laid on means and substance. The suspender states that, as a residenter in that parish, he has been assessed in it, for the year 1849-1850, on his means and substance, including, *inter alia*, means and substance derived from the stipend received by him as a minister; and that he has also, for the same year, been assessed within the parish of Stevenston, where his church is situated (and where, likewise, the assessment is laid on means and substance), upon his means and substance derived from his stipend, as being means and substance liable to assessment in that parish, in terms of § 47 of the New Poor Law Amendment Act, although he is not resident within that parish, but in the parish of Ardrossan. The suspender objects to this *last* assessment as illegal, not being warranted by the provisions of the statute; and the respondents having poinded his effects, the suspender brought this suspension and interdict against their carrying into effect a threatened appraisal and sale of his effects to enforce payment.

A record was made up; and the respondents maintained that the suspender, as a clergyman, is liable to be assessed for the poor in respect of his stipend, (§ 49). He is therefore assessable for poors' rates in the parish of Stevenston, under § 47, because he carries on the business or profession of a clergyman within that parish, and derives "means and substance," from or relating to such business or profession by way of stipend, to the amount for which he is there assessed in poors' rates. The word "business" is a flexible term, and comprehends any and every employment or occupation from which a party derives his livelihood and means and substance, or any portion thereof.

The Lord Ordinary (Wood), sustained the reasons of suspension, confirmed the interdict, and declared the same perpetual, and found the suspender entitled to expenses.

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His Lordship held that the duty the suspender performed in the church does not constitute an occupancy of it by him in the sense of the statute; and that the remuneration received by him could not be held to be derived from the occupancy of lands and heritages in the sense of the statute. As little can it be held that on a fair and reasonable interpretation of the Act, the provision in regard to means and substance derived from a trade, or business carried on within a pariah was intended to comprehend a case such as the present. The duties of the suspender, in so far as they consist of preaching, are in truth only a fractional part of those which his calling as a clergyman of the congregation among whom he ministers, requires him to discharge. By much the greater and more laborious portion is performed at his own residence, or in the dwellings of the members of the congregation, and it is for the aggregate of the whole that his stipend is paid, and paid not directly from the produce of the seat rents, in which he has no right, but from a separate fund derived from a variety of sources. The case could not be extricated by a division of the stipend among the different parishes which are the field of the suspender's labours, for no proper *data* could be found on which the apportionment could, with any approximation to accuracy, be made. The nature of the case appears to render this sufficiently obvious. But apart from such considerations, he held that there were good grounds for the conclusion that the assessment was illegal.

The respondents reclaimed.

Wood, and *Moncreiff*, for the reclaimers, referred to the case of *Gillan*, 18th December 1851.

Craufurd, and *the Solicitor-General*, for the respondent, (suspender).

THE LORD PRESIDENT. I have no doubt as to the soundness of this interlocutor. This income is certainly an assessable income as to means and substance. The only question is, where is it assessable? The case of *Gillan* was decided on special grounds, and not on § 47. I do not think this person can be said to carry on a trade or business in the sense of the statute. I do not look to the duty discharged in the church at all. He has other duties to perform, therefore, I cannot look to the church as the place where the main part of his duty is performed. Keeping this in view as well as the source from which his income is derived, I do not think this case can be brought within § 47 of the statute.

LORD FULLERTON. I am of the same opinion, and I think it is better for all parties that some decided course should be taken as to the locality of assessment, than that we should be constantly raising questions of this sort, which may encourage litigation, but cannot benefit the parties concerned in it. This § 47 is only applicable to particular cases, and which I do not think include the present case. It is better once for all to lay down as a broad rule that the locality of inhabitancy is to be adhered to as the locality of assessment.

LORD CUNINGHAME. I concur. There is no example of such a rating as is here demanded a *second* time, by another parish. The reclaimers refer to the late case of the *Rev. Mr Gillan* of Glasgow, and to the clause of the Poor Law Act, (sec. 49), making stipends assessable; but that enactment applies only to the stipends paid to the *established* ministers in parishes in which the

assessments are laid on, and not to the precarious contributions voluntarily paid to ministers of other denominations, preaching to congregations gathered from many adjoining parishes. Such contributions may possibly be assessable as *income* of the ministers in the parishes where they *reside*; but by the 47th clause of the Act, parties can only be assessed on means and substance in the parish of their residence, and in no other. Generally, there is no legal ground for assessing a dissenting minister in the parish where he preaches, but does not reside. His employment may not even be chiefly exercised within the parish in which the church happens to be situated.

LORD IVORY was of the same opinion.

The COURT therefore "adhere to the interlocutor of the Lord Ordinary reclaimed against: Find the suspender entitled to additional expenses," &c.

Patrick, M'Ewen, and Carment, W.S., Suspenders' Agents.

L. Mackintosh, S.S.C., Respondent's Agent.

(J. S. M.)

CAMPBELL v. CAMPBELLS.

No. 52.

Trust deed—Construction.

The late Charles Campbell of Leckuary by his trust-disposition and settlement conveyed the estate of Leckuary to trustees, for, *inter alia*, the following purposes. "4thly, As it is my wish and desire that my estate of Leckuary remain in my family, I direct my said trustees, and survivors of them, in the event of my having a son procreated of my present marriage, who shall attain to the age of twenty-five years complete, and be in every respect capable of managing his own affairs, to dispoise, convey, and make over to him, at his attaining said age, the foresaid estate of Leckuary, burdened and qualified, however, in such a manner as it shall not be in the power of my son to sell or dispose of the said estate during his life, but he shall only succeed to the liferent thereof, and failing him by decease, without leaving lawful issue of his body, then the said estate shall return to my eldest daughter if in life, and failing thereof, to her children, whom failing, to my second daughter and her heirs. 5thly, In the event of my having no son procreated of my present marriage, I direct and appoint the said estate of Leckuary to be made over in the foresaid manner, and under the foresaid burdens and qualifications, to my eldest daughter, upon her attaining the age of twenty-five years, or being lawfully married, whichever of these events shall first happen; and failing her by decease, and without leaving lawful issue of her body, then I direct the same to be made over to her immediate younger sister, under the said burdens and qualifications; and failing her also by decease, without leaving heirs of her body, then to my youngest daughter, and the heirs of her body."

By the last purpose of the trust, he directed, *inter alia*, in the event of his children all dying without issue, and before succeeding to the part of his means and estate provided for them, the estate of Leckuary to be conveyed "to Charles Campbell, my nephew, in liferent, and under similar restrictions as aforesaid, and to the heirs of his body in fee; whom failing, to Hugh Campbell, his brother, in liferent, and to the heirs of his body in fee; all whom failing, then to my own nearest heirs."

The truster died many years ago, leaving no son, but a widow, (Mrs Flora Campbell, one of the trustees,) and four daughters.

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The eldest of these daughters has drawn the liferent of the estate, according to the fifth purpose of the deed, ever since her father's death. Some years ago, she raised an action to have it declared, that she had a right also to the fee of the estate. The Court, however, decided, that, under the trust-deed, she could only have a liferent right.

The present action was raised by the same pursuer, (Mrs Isabella Ann Campbell,) and her eldest son, Colin Ward Campbell, to have it declared, that the fee of the estate now vested in the male pursuer; and that the two pursuers for their respective rights of fee and liferent, were entitled to sell the property.

There appeared two sets of defenders. 1st, Mrs Flora Campbell or Eckford, and others, being the third daughter of the truster, and her issue, and also the issue of the second daughter deceased, all of whom appeared in the character of heirs at law of the truster. 2d, Miss Helen Charlotte Campbell, and others, younger children of Mrs Campbell the pursuer.

The Lord Ordinary, (Rutherford), with an elaborate note, reported the case to the Court. His Lordship, in his note, expressed a decided opinion, adverse to the claims of the heirs at law, and leant to the conclusion, (in opposition to the pursuers,) that in the absence of any direct destination of the fee to the daughter's issue, except in the case of the youngest daughter, no issue of the present liferentrix could take the fee till the death of their mother.

J. Campbell appeared for the heirs at law, and maintained that there was no destination of the fee by the truster, and that it must therefore be regulated by the rules of intestacy.

A separate plea was also put in, on the recommendation of the Court, for Charles Campbell Penny, the eldest son of the deceased second daughter, as having (on the assumption of the fee being held not to vest till the eldest daughter's death,) an interest contingent upon the event of all the children of the eldest daughter predeceasing her.

G. G. Bell, with whom *the Solicitor-General*, (*Neaves*), appeared for the pursuers, and argued, that while the pursuer, Mrs Campbell, was entitled to the liferent, her son, the other pursuer, was, by the sound construction of the deed, now vested with or entitled to claim the fee.

The younger children of the eldest daughter, for whom *E. Gordon and Moir*, maintained, 1st, That according to the sound construction of the deed, the fee was to be divided equally among them, along with the pursuer their eldest brother; and, 2d, That in the event of their being held to have no right to the fee equally with their elder brother, the pursuers were not entitled to the decree of declarator as concluded for, because no fee could vest in the pursuer Colin Ward Campbell, unless he should survive his mother the liferentrix.

The last mentioned view, that the fee must be suspended till the death of the eldest daughter, was not originally urged by the defenders, but a plea to that effect had been added after the record was closed, at the suggestion of the Lord Ordinary.

The LORD JUSTICE-CLERK said, There can be no doubt that if the pursuers succeed in establishing their respective rights of liferentrix and fiar, they are entitled to decree in terms of the conclusions of this action. Various grounds of resistance to the action have been maintained by the different classes of defenders. The only plea which has seriously engaged the attention of the Lord

Ordinary and the Court, is, however, one which did not originally occur to Dec. 8. 1852. any of the parties, but was subsequently added, having occurred in the course of debate. That view is the most artificial which can be applied to the deed. If that view represents the intention of the truster, it is obvious that the structure of the deed is singularly defective and ill-devised for an object which might easily have been attained. For the trust is made to expire just at the time when, in order to fulfil that object, it ought to have continued. It is a fixed rule, that on the occurrence of the event when the trustees are to denude, not only does the trust come to an end, but the suspended or conditional rights which, up to that period *might* have come into operation, also come to an end, and vesting at once takes place. It is also fixed, that the suspension of the vesting of the fee is never to be admitted after that event, unless the right given by the conveyance which denudes the trustees is only a limited right. Where no machinery has been provided by the truster for suspending the fee, (which might have been so easily done,) we are not to presume such to have been contemplated. When the trustees are directed to *make over* the trust-estate, and no entail or limitation in the conveyance to be made by them is provided for, the rule is fixed in favour of vesting. Such limitations or substitutions are not to be inferred or made by implication, requiring something to be done by the trustees and inserted in their deed, besides what the truster has directed.

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These rules receive a wider application from another principle, also, in my opinion, finally fixed, viz., the importance which is always attached to the direction to convey *at a particular time*, or *on the occurrence of a particular event*; a direction to convey "to A., whom failing to B., *at a particular time*," implies an *absolute* conveyance at that time to one or other of these persons, and the "failure" has reference to the circumstances of that time, and not to the terms of the conveyance to be granted by the trustees.

Applying these principles to the present case, I entertain a strong opinion against the plea of the defenders. We have here no trace of an entail, and no trace of any provision for the continuance of the trust. On the contrary, we have a time for denuding, expressly laid down in the fifth purpose, "to be made over," &c., "to my eldest daughter, on her attaining the age of twenty-five years, or being lawfully married, whichever of these events shall first happen."

The trust is to be ended on the occurrence of either of these events, after the truster's death.

The alleged substitutions have now no effect whatever, for they referred to events which cannot now occur, viz., the death of the eldest daughter before the truster, or after him, without arriving at the age of twenty-five, unmarried. According to this view, there is now no room or occasion for a suspension of vesting, for the contingent interests which that suspension would have protected, have all perished; the eldest daughter has survived her father, attained to twenty-five years, and been married, either of which last events would have been sufficient. The time for denuding is long past, and the conveyance at that time to the eldest daughter of a provision, limited by reference to the provisions to a son in the fourth purpose, to liferent, *ex necessitate*, gives the fee to her issue. The condition, "without having lawful issue," had reference only to the event of her dying without issue, before reaching the age of twenty-five.

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On these plain grounds, which avoid the perils of conjecturing and inferring intentions on the part of the truster which he has provided no machinery for executing, I have no difficulty in forming an opinion adverse to the plea under discussion.

LORD COCKURN differed, holding that the period for conveying the fee had not arrived, but must be delayed till the death of the eldest daughter.

LORD MURRAY was of the same opinion. It was an ill-constructed deed, but only a liferent was given to the daughter, and as far as could be gathered, the fee must be suspended during her life. This was according to the intention of the truster, as far as could be gathered. It was a trust deed, in which intention was an important consideration, not an entail which must be subjected to strict technical rules.

LORD WOOD was of opinion that no fee could vest in any of the eldest daughter's children, unless they survived their mother. If none of them survived, it was carried by postponement to the issue of the second daughter. No conclusion could be drawn from any difference of expression in regard to the other daughters and their issue. The truster might have different intentions with regard to them. He might wish the fee suspended in the one case, and not in the other. The term of "making over" was not necessarily the term of vesting. Suppose the eldest daughter had arrived at twenty-five years without issue, that would still have been the term of "making over" the liferent to her, but in whom could the fee have then vested?

The COURT pronounced the following interlocutor. "Repel the plea in law of the pursuers, and find that they are not entitled to decree in terms of the conclusions of the libel, and decern."

J. Forrester, W.S., Agent for Pursuer.

J. Court, S.S.C., and G. Dickson, S.S.C., Agents for Defenders. (W. H. T.)

No. 53. PETITION, MRS MARTHA ROB or HALL, for appointment of a Judicial Factor.

Judicial Factor—Special Powers—Making up Titles.—As a general rule it is incompetent to apply for special powers in a petition to appoint a judicial factor, but such special powers must be applied for by the factor himself.

1st Division.

Dec. 4. 1852.

Petition, Mrs
Rob or Hall.

This petition was presented on behalf of Mrs Hall and others, who were described as the sole surviving parties resident in Scotland interested in the trust-estate of the deceased Robert Hall, merchant in Edinburgh;—That the whole of the accepting trustees were now dead, and it was therefore necessary to apply for the appointment of a judicial factor. That the trust-estate consisted of considerable property, both heritable and moveable. That part of the heritable property had been sold, while part still remains unsold; there is also moveable property, consisting of stocks and shares in public companies, still unrealised, and the accounts between the trustees and the various members of the family beneficially interested in the estate were still unsettled and unadjusted; it would therefore be necessary to grant authority to the judicial factor to be appointed to obtain himself duly invested in the heritable and moveable estate of the truster, to make up titles thereto, and to realise the same, and to divide the proceeds according to the rights of the parties beneficially interested therein. The petition therefore prayed for the appoint-

ment of a judicial factor with the usual powers; and specially, with power to Dec. 4. 1852.
 him, if necessary, to complete valid feudal titles, *habili modo*, in his person, as
 judicial factor foresaid, to such parts of the heritable estate of the said de- Petition, Mrs
Rob or Hall.
 ceased Robert Hall as may still be unsold, and to sell the same, and distribute
 the proceeds thereof among the parties legally entitled thereto.

Stuart, for the petitioners, submitted that the circumstances justified the application for special powers, and referred to the case of *Forbes*, 14th Feb. 1852 (*ante*, vol. i. p. 451); but,

The Court were of opinion that the petition must be dealt with in the ordinary way; and if special powers to make up titles, or otherwise, were wanted, another application must be made by the factor himself. The case of *Forbes* was a very peculiar one; there, two trustees differed as to the management, and the whole case was before the Court. The present case was quite different, and could not be taken out of the ordinary rule. They therefore named a judicial factor with the usual powers.

Christopher Douglas, W.S., Agent.

(R. S.)

BAYNE'S TRUSTEES v. THOMS.

No. 54.

Relevancy—Summary Application—General Averments.—Circumstances in which the Court sustained the relevancy of certain general allegations in a summary application in the Sheriff Court, to the effect of entitling the pursuers to a revisal of their papers, with the view of rendering their allegations more precise—*Observed* that a defective record should be allowed to be accommodated to the circumstances of the case.

This case came before the Court on a question of relevancy. A summary 1st Division.
Dec. 4. 1852.
 application was presented to the Sheriff-substitute of Fifeshire (Grant) to have
 the defender Thoms interdicted and prohibited from altering his dam-dyke on
 the river Eden, or obstructing the course of the river, in any way calculated to Bayne's Trust-
tees v. Thoms.
 injure the fall above, which has been used from time immemorial for driving
 certain mills in the lands of Newmill, and in which lands and pertinents, the
 petitioners, as trustees, stand infest. The petition stated that the defender Thoms
 is proprietor of another waterfall, situated farther down the river, and below the
 dam-dyke erected for conducting the water thereto. That for many years he
 has been altering his dam-dyke and raising obstructions in the bed of the
 Eden, thereby doing serious damage to the petitioners' waterfall, all as set
 forth in the subjoined statement of facts, and which render it necessary to have
 the same inspected, and altered to the proper dimensions, as fixed by a re-
 port and decret of the Court of Session, fixing the height of the respondent's
 dam-dyke in 1830, and therefore praying the Court for a remit to have the
 same inspected and altered, and the respondent ordained generally to put the
 whole premises in the state required by said report and decret, as necessary
 for the protection of the petitioners' property, &c.

In their statement of facts, the petitioners, after stating that the decree of the Court of Session in 1830 proceeded upon a report by Mr Jardine, fixing the height of the respondent's dam-dyke, set forth, that "the respondent, it is believed, did not immediately comply with the report of Mr Jardine. . . . And the respondents are informed by parties competent to ascertain the fact,

Dec. 4. 1852. *Bayne's Trustees v. Thoms.* that the judgment of the Court has never been properly fulfilled; and the respondent has lately reduced the length of his dam-dyke by several feet, within the limit" prescribed in that report, to the great injury and damage of the petitioners' property; that from the neglect of the respondent, and his operations otherwise, certain obstructions had formed "considerably higher than the prescribed height of the dam-dyke;" that the respondent has, within these few years, been gradually forming a new dam-dyke, greatly higher than the old one; "and if the petitioners are not very much mistaken, posts or other obstructions have been inserted," &c., to the great injury of the waterfall above, by preventing the free flow of the river over the respondent's dam-dyke.

The respondent lodged answers, and pleaded as a preliminary objection to the action, that the petitioners' statements are of too vague and indefinite a character to be entertained by a court of law. They do not set forth any substantial acts, alleged to have been committed by the respondent, sufficient to warrant the conclusions of the petition.

The Sheriff-substitute sustained the preliminary plea, and dismissed the action; to which finding, the Sheriff, on appeal by the petitioners, adhered.

The petitioners presented a note of advocacy to the Lord Ordinary on the Bills, (Anderson), who repelled the reasons of advocacy, and remitted *simpliciter* to the Sheriff, finding the respondent entitled to expenses. His Lordship had "no doubt as to the competency of the application;" and he was "not prepared to say that these irregularities might not have been amended or corrected in the course of revising the pleadings; but as both Sheriffs, to whom the duty of watching over the regularity of the proceedings is entrusted, were of opinion that it was more expedient to dismiss the application at once, than endeavour by correction to bring it into proper shape, the Lord Ordinary does not feel disposed to interfere with what they have done."

The petitioners reclaimed.

Donaldson, and *Deas*, for the reclaimers.

Cook, for the respondent.

THE LORD PRESIDENT. If the parties here were complaining that the judgment of the Court had never been fulfilled, they would have required to have made a positive allegation to that effect, and had it ascertained by inspection, or otherwise. But as set forth, the statement is insufficient to warrant any enquiry of that kind. Nor is it set forth specifically how the operations complained of were performed, but that might have been remedied and the allegations rendered more precise by a revisal of the papers; and if I had been dealing with them in the Sheriff Court, I would have been inclined, instead of dismissing the petition, to have adopted the more lenient course of ordering a revisal.

LORD CUNINGHAME. I agree; and as the litigation has arisen, in a certain degree, from the petitioners' own fault, neither party has any claim for past expenses.

LORD IVORY. I have a disinclination to interfere with the judgment of the Sheriffs in a matter of this kind; but there is a circumstance not to be overlooked; we ought not to encourage such proceedings as tend to multiplicity

of litigation, and, therefore, it is a good rule to allow parties to accommodate the record, if defective, to the real circumstances of the case. Dec. 4. 1852.

The Court, therefore, "recall the interlocutor of the Lord Ordinary submitted to review; Find that there is relevant matter in the original petition, remit to the Sheriff to sustain the application, and proceed therein as he may think just, but find neither party entitled to expenses."

Bayne's Trustees v. Thoms.

Murray and Rhind, W.S., Agents for Advocators and Reclaimers.

Hill and Robertson, W.S., Agents for Respondent.

(J. S. M.)

RUSSELL or HENDERSON AND OTHERS v. RUSSELL.

No. 55.

11 and 12 Vict., c. 36, § 43—*Entail Amendment Act—Prohibitory Clause—Alienation—Sale*.—When the prohibitory clause of an entail does not prohibit alienation by any other means than sale, the clause is defective, and the entail therefore invalid.

Act 1695, c. 24—*Provisions to Children—Trust-Settlement*.—An heir of entail possessed on apparenacy for more than three years; and after the date of the Entail Amendment Act he executed a trust-disposition and settlement, one of the purposes of which was to make provision for two of the truster's daughters. On his death, the trustees declined to accept, and his son, the next heir of entail, repudiated the settlement, and passing by his father, completed a feudal title as heir of entail and provision to his grandfather. The entail was defective under the Entail Amendment Act:—*Held* that although the main provisions of the trust were invalid, the sums bequeathed to the truster's daughters were of the character of rational provisions, and under the Act 1695 enforceable against the heir in possession.

This was an action of declarator and constitution, brought at the instance of Mrs Janet Russell or Henderson and Mrs Jane Russell or Neil against their brother, to enforce payment of certain provisions in their favour under their father's settlement. The following statement of facts is mainly taken from the note appended to the interlocutor of the Lord Ordinary in the cause (Wood). 1st Division. Dec. 7. 1852.

James Russell of Garbethill, on the 12th October 1756, executed an entail of these lands. On his death, his estate devolved upon John Galloway Russell, the conditional institute, who completed a title under the entail, by service, charter of resignation, and infeftment. He was succeeded in the estate by James Russell, who obtained a precept of *clare constat* from the superior, and was also infeft; but in consequence of a defect in the infeftment of John Galloway Russell, the entail never was feudalised, and continued personal during both his possession and that of James Russell. Russell, &c. v. Russell.

The succession opened to James Russell in March 1834, and he continued in possession till his death in October 1849. This, in the state of the title, was a possession on apparenacy alone, but it lasted for more than three years.

In November 1846, James Russell executed a bond of provision in favour of his four daughters, reserving power to alter or revoke the same. By this the daughters were to receive L.370 in the proportions therein mentioned.

On the 13th April 1849—and, therefore, after the date of the Entail Amendment Act—James Russell executed a trust-disposition and settlement, by which he conveyed the estate of Garbethill to trustees, for the purposes therein mentioned. The object of one of these purposes was to make provision for the pursuers, Mrs Janet Russell or Henderson and Mrs Jane Russell or Neil, two of his daughters; and, accordingly, by that purpose there is settled upon each of them a provision of L.500.

Dec. 7. 1852.

Russell, &c. v.
Russell.

As James Russell's title of possession was only that of apparent heir, the defender, William Galloway Russell, the son of the truster, and the next heir of entail, refused to acknowledge the trust-disposition and settlement as an effectual conveyance of the estate. He accordingly served himself heir of entail and provision in general to his grandfather, John Galloway Russell, and completed a feudal title to the lands by infeftment, in virtue of the precept of sasine contained in the charter of resignation and confirmation granted by the superior in favour of John Galloway Russell.

In this situation the pursuers brought the present action, in which not only William Galloway Russell, but the other existing substitute heirs of entail are called as defenders, the object of the action being to enforce payment from the defender, William Galloway Russell, of the provisions settled upon each of them respectively by the settlement of their deceased father, and for which they maintain that he is liable, on the ground that the entail is invalid and ineffectual in one or more of the requisite prohibitions; and that, therefore, James Russell, their father, by virtue of the enactment in the 43d section of the Entail Amendment Statute, held or possessed the estate as a fee-simple proprietor—that he did so as heir-apparent for more than three years, and that the provisions settled upon them, being rational and reasonable in themselves, they form good claims against the defender, the next heir, passing by his immediate predecessor, and entering to one more remote, in terms of the Act 1695, c. 24.

The prohibitory terms of the deed of entail, so far as material, were as follows: "That all heirs succeeding to these lands shall be obliged from that time forward to assume the name of Russell, if formerly they were called by another surname; and that refusing or neglecting so to do shall make their right void and null, and be ground of declarator for that effect at the instance of the next heir of provision to whom the contravener's right shall accresce and belong henceforth, but always with the burdens and irritancies before and after mentioned: That none of said heirs, whether of my body or not, shall have liberty or power to infringe or alter this destination or order of succession, or to do any deed to its prejudice, whether by contracting debt on said lands, which by diligence thereon may evict or carry off the same, or by selling them, or mortgaging them, or any part of them, or any way whatsoever, whereby succeeding members, their hopes of succession thereto, may in any measure be evaded."

The pursuers pleaded that the entail is defective, in respect, (1,) the prohibition against altering the order of succession does not prohibit alteration by voluntary deeds; and, (2,) in respect the prohibition against alienation does not prohibit alienation by any other means than sale; and that therefore being defective and ineffectual in regard to these prohibitions, the entail is, in terms of § 42 of the Entail Amendment Act, invalid and ineffectual as regards *all* the prohibitions.

The defender admitted the validity of any claim under the bond of provision of 1846, but pleaded that if the entail shall be held to be good, the demand against him under the deed of settlement is not maintainable; and even if the entail is defective, he is not liable, because the bequests were gratuitous, and the pursuers were not creditors of their father on account thereof; also he cannot be held liable by serving to a party who could not,

while in life, be held as fee-simple proprietor, to perform the deed and implement the obligations of an interjected heir: The provision of the Rutherford Act is inapplicable to such a case. Dec. 7. 1852.
Russell, &c v.
Russell.

The Lord Ordinary (Wood) held that the prohibition against alienation was defective, and therefore that the entail is ineffectual, and the lands of Garbethill liable to the deeds and debts of the heir in possession of the same. That the provisions granted to the two pursuers "are fair and rational provisions, and that the said trust-disposition and settlement, so far as regards these provisions, is an onerous deed: and that the said provisions are onerous debts of the said James Russell, for which the defender, the said William Galloway Russell, is liable in terms of the Act 1695, c. 24." His Lordship in his note referred to the cases of *Kennedy*, 11th Feb. 1829, 7 Shaw 397; *Countess of Glencairn*, 23d May 1800, Mor. App. No. 1, *voce* heir-apparent.

The defender reclaimed.

Patton, for the reclaimer, argued, that the deed of settlement was in the form of a trust-deed, which conveys the estate of Garbethill to certain parties, as trustees for the purposes therein mentioned. It is a settlement of his whole estate for the purpose of distribution after his death. The payment of the sums sued for is one of the purposes of the trust. But that trust was invalid, because James Russell had no power as an heir apparent, under the 43d section of the Entail Amendment Act, so to dispose of the estate of Garbethill; and therefore, the deed being ineffectual in its main provisions, a subsidiary legacy cannot be effectual. Separately, the sums claimed were gratuitous, and of the character of simple legacies—*Ersk.*, b. iii., t. 8, § 94; *Muirhead*, Jan. 1724, Mor. 9807; *William Lindsay v. the University of Glasgow*, Baron Hume, 429. In *Glencairn's* case, the deed must be held to have been delivered. See *Ersk.*, b. iii. t. 3, § 44.

Duff, and the *Solicitor-General*, for the respondents. The 42d section of the Entail Amendment Act expressly applies to heirs-apparent. These provisions are rational and onerous; *Thom*, June 1779, Mor. 2292. The trustees might have proceeded by adjudication to establish a title. This is not a question as to the form of the deed, but as to the substance of what was intended to be done; *Glencairn*, *Kennedy*, as above; *Adamson v. Inglis*, 16th Nov. 1832, 11 S. p. 40.

The LORD PRESIDENT. I concur with the Lord Ordinary in thinking that the entail is defective as regards the prohibition to alienate; and consequently, that the provisions of § 43 of the Entail Amendment Act here apply. The question now comes to be, whether the deed of settlement is such a deed or debt of James Russell as to be within the rule of the Act 1695. Provisions to wives and children—that is, reasonable ones—are considered onerous deeds by that Act. That is settled by the case of *Kennedy*. Indeed, the provisions to grandchildren have been held to be within the scope of the Act; *Maclean*, 8th Feb. 1765, House of Lords, Paton's Reports, vol. ii. p. 95. It is admitted that a sum of L.500 to each of the daughters is not excessive in point of amount. Their share in the bond of provision of 1846 would have been less than L.100 to each. That was all that James Russell could give at that time; but when his powers increased, there was nothing to prevent him giving increased pro-

Dec. 7. 1852. *Russell, &c. v. Russell.* visions, which could be enforced by the Act 1695, if they were not unreasonable in amount. I understand that the pursuers here do not claim both the L.500 and the share of the L.370 under the bond of provision of 1846. It does not affect the question that there are other daughters who claim under that bond. The most important question is that which arises on the form and nature of the deed on which the pursuers rest their claim. That deed is correctly described by the defender as a deed of settlement of the whole estate for the purpose of distribution. It is not in the form of a bond in security. It is in the form of a trust; and one purpose, after paying debts, is to pay the provisions to the pursuers, who also have an interest in the residue. The estate of Garbethill appears to have been entirely the substance of the estate so conveyed; and as the testator had no power to convey such an estate, the trust has fallen, and the question is, whether these two sums of L.500, which were payable through the instrumentality of the estate, are now available to them.

Upon that question I have come to the conclusion that they have so much the character of provisions as to be payable. We must look to the substance of the matter rather than the form in such a case. There is no particular form in which such provisions must be made. The trust was a trust for behoof of the daughters, and they were creditors to the extent of their interest in that trust, and, therefore, these provisions might be considered as onerous provisions, and so protected by the Act 1695. The case of *Lindsay* does not appear to be in point. The obligation to provide for children is what constitutes the onerosity. The provisions in favour of younger children are to be regarded as the fulfilment of an obligation; and there is no more general mode of fulfilling that obligation than by a general settlement. These, therefore, are onerous provisions, which are effectual against the heir in possession.

LORD FULLERTON. I am entirely of the same opinion. No doubt one cannot but be struck by the argument of the defender, but I am of opinion that it is answered by the remark, that in every case of this kind on the Act 1695, in regard to provisions to younger children, the question is to be determined not by the form, but by the substance of the deed—whether in the circumstances of the case it was a fair obligation of that kind which could be considered as of itself onerous; and that involves two different elements: (1.) There must be such a relation between the parties as admits of an onerous relation subsisting between them; (2.) That obligation must be of itself rational. Accordingly, that is the principle of all the cases referred to. If the equitable principle of law sustain reasonable provisions, as an onerous obligation, effectual under the Act 1695, I think, looking to the substance of the provisions here, and it being clear and not denied that the provisions are reasonable in themselves, that they ought to be sustained.

LORD CUNNINGHAM agreed as to the defect in the entail, and the power of James Russell, as apparent heir, to burden the property freed of the entail, with suitable and rational provisions to the younger children. He was of opinion that the whole argument raised on supposed peculiarities in the present case, particularly on the circumstance of their being conferred by a *testamentary deed*—*postnuptial*—and granted *mortis causa*, is inapplicable under the circumstances which here occur. No doubt, *postnuptial* pro-

visions to children revocable and payable at the granter's death, can never compete with *stranger* and *onerous* creditors, with whom the father has contracted during life; but there is no room for that plea here. There are no onerous creditors of the granter in the field; he seems to have left none, and his heir is claiming a valuable estate unencumbered, without paying a farthing of the provisions made by his father. In such a case, it has been long settled, that younger children with provisions made by a solvent father by any deed, whether *mortis causa* or not, are *quasi* creditors of the father for debts of a definite description claimable from the heir, as the representative of the granter and his creditors, though not against the onerous creditors of the father.

Dec. 7. 1852.
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LORD IVORY. I confess I cannot shake my mind free from doubt as to the soundness of these conclusions as respects the statute 1695. The ground of my doubt—and which I do not wish to press—is simply whether the bequest in the present case is of that kind and degree of onerosity as to bring it within the statute 1695. I do not know any case which has come up to this case in precise terms, and looking to the testamentary character of the deed, and the *modus operandi*, I think the provision is no better than an ordinary legacy. I am not prepared, on the strength of the authorities, to say that such a legacy is, *inter hæredes*, a debt or deed of the party in the sense of the Act 1695. The case of *Kennedy* comes near to the present case, for there the bonds of provision were declared *in gremio* to be revocable; but although it may be viewed as perhaps a subtle distinction, it is not without substance, that a deed on which a party has got a right in him by delivery and infeftment, though it may be defeasible by subsequent revocation, is not the same revocable trust-settlement; and I doubt, where the power of revocation has not been exercised, that the provision stands in a different situation from provisions where there was no power of revocation at all; but I bend to the potency of authority opposed to me. On the other parts of the case, as to the invalidity of the entail and the operation of the recent statute, I concur with the Lord Ordinary.

The Court “refuse the prayer of the reclaiming note, and adhere to the interlocutor of the Lord Ordinary reclaimed against: Find the defender, William Galloway Russell, liable in additional expenses,” &c.

Scott and Gillespie, W.S., Pursuers' Agents.

James Burn, W.S., Defender's Agent.

(J. S. M.)

CROCKART v. DUNDEE & ARBROATH RAILWAY COMPANY.

No. 56.

Process—Wakening and Transference—Advocation ob contingentiam—Arrestment jurisdictionis fundanda causa.—Where a multiplepinding in the Sheriff Court had fallen asleep, and the common debtor and some of the competing claimants had died, leaving representatives abroad:—*Held* that the proper course to adopt is to obtain decree of wakening and transference in the Court of Session, and carry that decree to the Sheriff Court, and that an *advocation ob contingentiam* is incompetent.

1st Division.
Dec. 7. 1852.

This case was reported by Lord Rutherford on a point of form as to the competency of an *advocation ob contingentiam*, and of an *arrestment jurisdictionis fundanda causa*, under the following circumstances:—Crockart obtained decree

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Arbroath Rail-
way Co.

Dec. 7. 1852. before the Sheriff of Forfarshire against James Milne, for a sum of £50 and expenses of process. On the dependence of this action, he had used arrestments against Milne in the hands of the Dundee and Arbroath Railway Company. An assignation was said to have been granted by Milne in favour of David Stewart and others, of the debt due by the Railway Company, on which a demand had been made on them for payment. The Company having refused to make payment to either party, Crockart brought a process of multipointing, in the name of the Railway Company, against himself, and Stewart and others, pretended creditors of Milne. In this action the pursuer, and Stewart and others lodged competing claims, on which a record was made up, but not closed.

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way Co.

At this stage of the process, the common debtor and some of the competing claimants died, and nearly the whole of their representatives were resident abroad—some in America, and some in Ireland—and the process was allowed to fall asleep.

In order to transfer the process against these foreign representatives, Crockart instituted an action of wakening and transference before the Court of Session, but in doing so he did not previously use any arrestments *jurisdictionis fundandæ causa*. He then brought an advocacy of the Inferior Court process *ob contingentiam*. And his proposal was, to have decree of transference, and then proceed in the original process as advocated, as the Court then would have full jurisdiction over all the parties, both native and foreign.

The authorities on which he relied in adopting these proceedings were the following: Ersk., B. iv. Tit. 1, § 6; Bell's Com., vol. ii. p. 68; *Mansfield and Company v. Smith, Wright, and Gray*, 17th June 1795, M. 2594; *Black and Knox v. Ellis and Sons*, 7th June 1805, 13 F. C., p. 473; and *Miller v. Ure*, 23d June 1838, Shaw, vol. xvi. 1204; Shand's Practice, vol. ii. p. 544, and authorities there quoted; Darling, vol. ii. p. 325; M'Glashan's Forms of Process, p. 433, § 1502; and Maclaurin's Forms of Process, vol. ii. p. 385.

The Railway Company lodged a minute, in which, approving of the procedure adopted by Crockart, they consented to the decree of wakening and transference, and to conjunction. But the Lord Ordinary thought it *pars judicis*, that the questions of jurisdiction and of competency should be determined, and he reported the case accordingly.

Penney, for the pursuer.

Horn, for the Railway Company.

THE LORD PRESIDENT. I think there is no reason why we should stop the parties going on in the course they are taking. It appears to be settled by the authorities referred to, that where parties are abroad, the transference must be made by the Superior Court, although the process is in the Inferior Court. Now, if the process be asleep, which is the case here, it appears to me that, on the same principle of transference, the wakening should be in this Court, and I cannot see any objection to its being so. But suppose we have the wakening and transference in this Court, there are two difficulties still remaining, (1.) as to the want of jurisdiction over the defenders in the wakening and transference. It is settled by the case of *M'Lauchlan v. Rob*, 14th May 1831, 9 S. 588, and *Cameron v. Chapman*, 9th

March 1838, 16 S. 907, that the transference should be preceded by arrest-^{Dec. 7. 1852.} ment to found jurisdiction, and if there was no jurisdiction the transference was incompetent; but these were cases of direct petitory actions, in which the ^{Crockart v. Dundee and Arbroath Rail- way Co.} representatives of the defenders were abroad. But it has been settled by several cases, that in a multiplepinding it is not necessary to found jurisdiction by arrestment in order to found jurisdiction in the competition, and therefore if that be so, the transference being an accessory action, it may not be necessary to found jurisdiction in respect to it, and therefore perhaps the want of arrestment in this case may not be fatal in the case of competition, otherwise there would be an impossibility of getting on with the case at all, where the parties in the competition die, leaving representatives abroad. But, (2,) suppose we have the awakening and transference, how are we to get at the process in the Inferior Court? Now it has been suggested to have an advocacy *ob contingentiam*. But that would be bringing up a process in which there are no parties: also it would be bringing up a process which is asleep. I feel the difficulty of advocating *ob contingentiam* where there are no parties to the transference. Why not take decree of wakening before decree of transference, which would still admit of advocating to a depending action? If that cannot be done, the only course is to adopt the course of taking decree of wakening and transference, and then advocate the Inferior Court process, in respect of the want of jurisdiction by the Sheriff over the foreign defenders.

LORD IVORY. I am afraid that do what the Court will, they cannot keep to principle in this case; and that in order to solve this difficulty, force must be used. I am sorry that the question should have arisen without any proper contradictor. This has been a puzzle all along: the most instructive case is that of *Ross, 1754*. Now the importance of this case is, that to it all writers of practice refer as founding the dictum *ob contingentiam*, but it does not do this: it was advocated for want of jurisdiction. I have looked through all the authorities and the MSS. of Clerk Tait, the greatest formalist we have had in the Court, and I find nothing to sanction this course of advocacy *ob contingentiam*. It is only in later books that we find anything about advocacy *ob contingentiam*; and on principle, I rather think it is not competent. Here it is incompetent, both on account of the sleeping of the case and the want of transference. Now, both of these obstacles remain so long as the process is unawakened and not transferred, and until it is awakened nothing can be legally done in it. If I take decree of awakening and transference, that process is at an end, and there is nothing to bring it up to *ob contingentiam*. The parties should bring their awakening and transference in this Court, and having so brought it, they should take their decree both of awakening and transference. They have then the process awake and transferred against the parties. The difficulty arises as to transference, that you have transferred it against parties in this Court, over whom the Inferior Court has no jurisdiction: but the course proper to be taken seems to be the same as when there were two Lords Ordinary who sat here in the two Divisions, and decree was taken before the one and handed over to the other. I think the decree should be carried to the Court below, and the process awakened by an interlocutor of the Sheriff, to the effect that he has not jurisdiction over the parties in the transference. The advocacy *ob contingentiam* is quite incompetent, because it was taken when the process was asleep, and also because there are no parties, there being then no transference.

The other Judges concurred.

Dec. 7. 1852. The Court "Remit to the Lord Ordinary to sustain the present process of wakening and transference, and to pronounce decree conform to summons."

Crockart v. Dundee and Arbroath Rail. Co. In the advocacy, "The Lords having, on report of Lord Rutherford, considered this process of advocacy, together with a relative process of wakening and transference . . . remit to the Lord Ordinary, with instruction to dismiss this process of advocacy as being incompetent, and to decern."

Jollie, Strong, and Henry, W.S., Pursuer's Agents.

William Miller, S.S.C., Agent for Railway Company.

(J. S. M.)

No. 57.

FLOWERDEW v. HOW.

Process—Act 1 and 2 Vict., c. 86—Suspension—Reduction—Interlocutory Judgment.—Note of suspension, without reasons, of a charge upon a decree for incidental expenses, in a process still pending in the Sheriff Court—*held* incompetent. A reduction of the same decree, coupled in the same interlocutor, (the interlocutor being *ex facie* regular,) with an incidental order to revise the record, and to delete certain passages—*held* incompetent.

2d Division. This suspension and reduction arose from an action still pending in the Sheriff Court of Forfarshire. The Sheriff-substitute, at a meeting with the parties on the summons and defences, intimated that certain averments in the defender's (suspender and pursuer, in this Court) counter-statement were irrelevant and improper; and on 28th Oct. 1851, issued an interlocutor, appointing revisal, and the said expressions to be deleted therefrom.

Dec. 8. 1852.
Flowerdew v. How.

The suspender had marked on his defences his declinature "to delete *any part*" of his statements, and he reclaimed against the said interlocutor. Answers were ordered, and the Sheriff-substitute having adhered, an appeal was taken to the Sheriff, and by him dismissed. In this incidental discussion certain expenses were incurred, and for these a decree was pronounced, and the defender, in the same interlocutor, ordered of new to revise his paper in terms of the previous order.

This interim-decree having been extracted and charged on, the defender brought the present process of suspension, followed by an action of reduction, which processes were conjoined. The note of suspension was in the form prescribed by the Act 1 and 2 Vict., c. 86, sec. 4, for suspension of decrees *in foro*, and had no reasons appended.

The Lord Ordinary, (Cowan) "in the action of suspension, repelled the reasons, and found the letters and charge orderly proceeded; and in the reduction, sustained the defences and assoilzied the defender."

The suspender reclaimed.

Penney, for the suspender and pursuer.

G. Patton, and Solicitor-General, (Neaves), for the respondent and defender.

The Court observed, that the note of suspension ought to have had "reasons" appended on being presented in the Bill Chamber. The object of the statute was to allow final judgments to be at once brought into the Court; but this was a mere interlocutory and incidental judgment, and reasons ought to have been given, that the Lord Ordinary on the Bills might have some *prima facie* evidence on which to proceed in passing the note.

As to the action of reduction, it was incompetent. The interlocutor sought to be reduced was a mere order in regard to certain expressions in the record, and a decree for expenses in an incidental matter. It was *ex facie* regular, and could not be reviewed by the Court while the cause was still depending in the Sheriff Court. There might be redress, but not by the means now attempted.

The following interlocutor was pronounced:—"recall the interlocutor of Dec. 8. 1852. the Lord Ordinary, disjoin the process of suspension from the process of reduction, find that the suspension of the charge on the decree mentioned in the note of suspension, was not competently presented under the Act 1 and 2 Vict., c. 86, sec. 4, and ought not to have been passed as competent under that section of the Act; therefore find that there is no competent process of suspension in Court, and dismiss the same as incompetent; Find the suspenders liable in expenses, and decern. In the process of reduction, find that the only matter brought under reduction is a decret extracted for a sum of expenses awarded under an interim order, and decree pronounced in a depending process; Find that on the face of the said decree, to which alone the Court can look, there is *ex facie* no objection to the same; Find it incompetent in that process to review or alter the interlocutors which led to the said decree, pronounced in a depending process in the Sheriff Court; therefore, and without prejudice to any redress which may be competent to the pursuer of the reduction, after the final issue of the Inferior Court process, repel the reason of reduction, dismiss the action, and assoilzie the defender," &c.

Wotherspoon and Mack, W.S., Suspenders' Agents.
L. M. Macara, W.S., Respondent's Agent.

(W. H. T.)

WILLIAM CUNINGHAME STEELE and OTHERS, PETITIONERS. No. 58.

Curators—Bonds of Caution—Delivery of.—Curators appointed in an action of choosing curators, produced discharges by the beneficiaries who had all become major, and petitioned the Court for delivery of their bonds of caution. The Court refused, except on the report of the Accountant of Court.

In an action of choosing curators at the instance of certain minors, the 2d Division. nomination of the petitioners, as curators, had been sustained, and they had found caution in common form. The minors had now all attained majority, and each had, on the occurrence of that event, granted a deed exonerating and discharging the curators, and ratifying all their transactions. Dec. 9. 1852.
Pet. Steele, &c.

The petitioners now prayed the Court, "after such examination and audit as to your Lordships may seem proper, to grant warrant to and ordain the Accountant of Court, or other custodier of the said bonds, to deliver to the petitioners the two bonds of caution granted by the petitioners, for the faithful discharge of their office.

The discharges by the minors were produced in process.

The Court ordered intimation and service upon the minors.

At next calling.

W. H. Thomson, for the petitioners, moved the Court to order delivery of the bonds *de plano*, as had been done by the First Division in the case of *Rollo*, 3d July 1852.

The LORD JUSTICE-CLERK remarked, that he considered such a proceeding as irregular. If the bonds were once in the hands of the Court, they could not order delivery of them without judicial examination, notwithstanding that the beneficiaries had all expressed themselves satisfied, and had discharged the curators. The Court therefore remitted to the accountant of Court to examine and report.

John Patten, W.S., Agent.

(W. H. T.)

No. 59.

AIKMAN v. AIKMANS.

Process—Examination of old Witnesses.

1st Division. In this case the summons had never been enrolled, and no defences had been lodged, and a minute had been lodged by the pursuer abandoning the action. This was an application now made by one of the defenders, for a commission to take the evidence of old witnesses, to lie *in retentis*. The Court granted the application, the examination to proceed upon adjusted interrogatories; and on a subsequent application by the defenders to allow the examination to proceed without adjusted interrogatories, the pursuer intimated that he was willing to agree to this, provided he got six days' intimation of the names of the witnesses, and the diet of examination.

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The Court considered such notice to be reasonable, and refused to alter the interlocutor except on consent.

E. S. Gordon, and the *Solicitor-General*, for the pursuer.

Patton, for the defenders.

Dundas and Wilson, W.S., Pursuer's Agents.

Smith and Kinnear, W.S., Defender's Agents.

(J. S. M.)

No. 60.

SIBBALD v. GIBSON & CLARK.

Lien—Factor's Right of Retention.—A factor's right of retention extends over all property coming into his hands in his capacity of factor, though by a transaction separate from that in respect of which he makes his claim; and he has his right of retention, though his claim is uncertain in amount and illiquid.

2d Division. The pursuer is a corn-factor in Leith, and the defenders are a firm of corn-
Dec. 10. 1852. merchants in Glasgow, and the parties were in the habit of dealing with each other, the former as consigner and the latter as consignees. The defenders, in December 1850, purchased, on behalf of the pursuer, a quantity of oats, with the view of reselling them on his behalf. It was agreed that they were to be entitled to one commission, for both purchase and sale, of four per cent. The defenders held the oats for the pursuer for some months, endeavouring to sell at a price which he required, when he at last, in July 1851, took them into his own hands. A dispute then arose as to the amount of commission due, the pursuer offering only a small sum for the purchase, and the defenders maintaining that, by the custom of trade, they were entitled to the whole sum originally stipulated for, notwithstanding that the pursuer had taken the sale into his own hands.

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The September following, while this dispute was still unsettled, the pursuer made a consignment to the defenders of a quantity of beans to be sold on his behalf. The beans were sold in different lots, and an account of sales sent to the pursuer, stating the sum realised, and charging commission and *del credere*, and the defenders stated, at the same time, that they were making up an account-current which they would transmit next day. The account was sent in; in it they charged commission on the oats at three per cent., and brought out a balance, after giving credit for the beans, of L.5, 12s., for which they enclosed a draft. This draft the pursuer returned, and a

correspondence ensued, the parties also disagreeing about the commission on the oats ; and, finally, the present action was raised for the price obtained for the beans.

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A great number of letters were produced, but they contained nothing relevant to the points on which the case ultimately rested, except that they shewed that in the communications of the parties in respect to consignment of the beans, nothing was stipulated in relation to that transaction, either on one side or the other, in regard to the still unsettled question of the commission upon the affair of the oats.

The defenders pled a right of retention of the price of the beans for their claim of commission for the oats.

The Lord Ordinary (Robertson) found for the pursuer, and the defenders reclaimed.

Gifford, with whom *Deas*, for the defenders, maintained that the account was a regular account-current, and the commission due on the oats and the price of the beans were items of a series of transactions between the parties as principal and consignees, and the former was not entitled to demand payment of the one without giving credit for the other. Moreover, the principle of the factor's lien is, that it extends over all goods of the principal in possession of the factor. There had been no stipulation or understanding that this right was to be waived in the present transaction.

T. Mackenzie, with whom *Penney*, for the pursuer, maintained that the defenders had no right to retain the proceeds of one transaction, either in security or in compensation of a claim belonging to another distinct transaction, which had been previously settled, except some difference about the amount. There was a chasm between the two, and the defenders had now no subject in their hands on which to exercise their right of retention for the commission claimed on the first consignment. They had abandoned that right when they returned the oats to the consigner. They were attempting to retain money in security of an illiquid claim, which was due upon one which was liquid.

The LORD JUSTICE-CLERK observed : The questions of liquid and illiquid does not apply to the right of retention ; you cannot *compensate* a liquid by an illiquid debt, but you can retain what is due for a liquid debt, in security of one which is future, uncertain in amount, and illiquid. The right may be limited by the nature of the employment and transaction. In the case of a factor, the right extends over all goods coming into the factor's possession in that character, and is by no means limited to the particular goods, in respect of which, the claim of commission, outlay, &c. arises. Indeed, the factor has seldom the opportunity of using his right of retention, except over parcels coming into his hands *subsequently* to that which has given rise to his claim. The rule is thus applicable almost exclusively to the very cases in which the pursuer maintains it to be inapplicable. The alleged separation of the two transactions has no bearing on the case. That question can be entertained only in the case of the bankruptcy of the consigner. As to a special understanding in the present case, where the beans were consigned, that all right of retention for the sum yet admittedly due, though uncertain in amount,

Dec. 10. 1852. in relation to the oats, was abandoned, there is no trace of it in the correspondence. See Bell's Prin.

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LORD COCKBURN also held that the factor's retention applied here, and in all such cases, unless when, either it was expressly abandoned, or so long a time had elapsed between the transactions, as to imply abandonment.

LORDS MURRAY and WOOD concurred.

The following interlocutor was pronounced, "alter the interlocutor of the Lord Ordinary, and find that the defenders employed as factors by the pursuer, had a right of retention against the proceeds of the beans sent to them by the pursuer, to be sold for him by them as factors, and which price they received by the sale thereof, for and on account of their claim of commission on the preceding transaction in which they purchased a quantity of oats for him as factors, and which commission was unsettled and due at the time when the pursuers sent to them the said beans for sale. Find that the pursuer has failed to prove that there was any agreement or understanding at the time when the beans were so sent to the defenders for sale, that the price thereof should be remitted free of any claim for commission on the preceding transaction, and that the defenders were to be only bound to make the same good in an *actio contraria*, in respect of the preceding transaction: Therefore sustain the defenders' right of retention, in respect of said commission due to them as factors, against the price of the beans subsequently coming into their hands as factors employed by the pursuer."

A remit was also made (of consent of parties), to a merchant to determine of the disputed commission.

John Harvey, S.S.C., Agent for Pursuer.

Andrew Fyfe, S.S.C., Agent for Defenders.

(W. H. T.)

No. 61.

RITCHIE AND M'CORMACK v. FRASER.

Jurisdiction—Personal Citation—Domicile of Origin.—A native of Scotland, long resident in New York, came to this country, and resided for upwards of forty days, partly in a hotel, and chiefly at the house of his agent in this country. He paid occasional visits to his father, who resided in Scotland, and was absent a few days in Ireland, and also in London:—*Held* that these visits did not disturb the continuity of his residence, and that having been personally cited, he was amenable to the jurisdiction of the Scotch Courts.

1st Division.

Dec. 11. 1852.

Ritchie, &c.,
v. Fraser.

This case came before the Court on a question of jurisdiction. The defender, Fraser, is a native of Scotland. He resided for many years in New York, where he was a partner of a company carrying on business there as merchants. On or about the 8th or 10th of May 1851 he came to Dundee in the course of business, and resided for a few days at a hotel there. He afterwards resided in a friend's house in Dundee, and left this country on the 7th of July; thereafter, during his residence in Scotland, he occasionally visited his father in the neighbourhood of Alyth. He left Scotland for Ireland on the 25th of May, and returned on the 30th to Dundee, and on the 26th of June he went to London for four days, returning to Dundee on the 30th of same month. The house he resided in was the house of one of the agents in this country of the defender's firm in New York.

On the 4th of July a summons was executed against the defender personally in Dundee for payment of a company debt. The defender pleaded no

process, in respect that when cited he was not amenable to the jurisdiction of Dec. 11, 1852. the Court, not having been forty days in Scotland. Proof was allowed.

The Lord Ordinary (Robertson) "Finds that the said company, and the individual partners thereof, are not alleged to have any funds in this country, and that no arrestment *jurisdictionis fundandæ causa* has been used against them. . . . That the defender was not resident within Scotland for forty days continuously, and had not acquired the domicile for citation of a continuous forty days' residence at the date of the execution of the said summons; and therefore finds that the defender is not amenable to the jurisdiction of this Court," &c.

Ritchie, &c.,
v. Fraser.

His Lordship referred to Lord Ivory's note to Erskine, p. 37, and the cases there mentioned; *Grant v. Pedie*, 5th July 1825, W. and S. 1. p. 716; *Christian v. Christian*, 14th June 1851, Scottish Jurist, vol. xxiii. p. 541; Ersk. b. 1. t. 2, sec. 16; Fount., Nov. 12, 1709; *Lees*, Dict. 4791; *M'Niven v. Mackinnon*, 14th Feb. 1834, S. 12, p. 453.

The pursuers reclaimed.

Deas, for the reclaimer, argued that the transactions out of which the debt arose against the defender's company, might be said to have taken place in Scotland, and referred to *Kirkpatrick*, Rob. Ap. Cases, 487, 16 S. 1202.

The Solicitor-General, for the respondent.

THE LORD PRESIDENT. The sole question here is a question of jurisdiction, the defender having been effectually cited if jurisdiction exists. There are various grounds on which it is maintained that there is jurisdiction. The defender was a native of Scotland who had returned to this country, and it is said that, by force of this circumstance, and of his having been personally cited here, there is jurisdiction. That was not a point in the case of *Pedie v. Grant*. But then, it is said, not only so, but there is jurisdiction also, in respect that the transactions in which these parties were concerned may be said to have taken place in Scotland. That is a constructive kind of dealing, and I do not think there is much strength in it.

Then it is said he was in Scotland for a period of upwards of forty days, and in that way, taking it in combination with his domicile of origin and personal citation, that he was properly cited. Against this, dicta of Erskine are quoted. I am not sure how the question might be as to citation left for the party; but when we are dealing with a question of residence in Scotland for a period sufficient to create jurisdiction, the character of the residence is not of so much consequence—whether he was living in a friend's house or by himself. The fact of his living continuously in a friend's house, and not flitting about, is about the best kind of settlement that a party could have. It would not have made matters any better if his family had been residing with him. He was living where every body could find him, and he is here on business, which could very well be settled here. On a view of all these matters, I am disposed to think there was residence here sufficient to create jurisdiction. I do not think it is laid down that forty days' continuous residence is necessary; for in that case, a native of Scotland, who comes to reside here, but may require to be in London at the beginning of every month, never could acquire a residence. On the other hand, I would not be disposed to hold that

Dec. 11. 1852. *a party was in the converse position, if an Englishman for example, were to be here for two or three days in every month, and adding these days altogether till they made up forty days, it were argued that that was sufficient to create jurisdiction. But I do not think there is such interruption here of continuity of residence as to enable the defender to say that he has not been forty days resident here. I think, that in the circumstances here, there is sufficient to constitute jurisdiction, and therefore, I am not disposed to adopt the interlocutor of the Lord Ordinary.*

Ritchie, &c.,
v. Fraser.

LORD FULLERTON. I am of the same opinion. The case of *Pedie* decides nothing but this, that where a Scotchman, living abroad, comes back to this country, the mere circumstance of the domicile of origin being Scotch, does not warrant citation. There is no question of that kind here. The question here comes to be, whether or not the party who returns to this country, and, after having resided here for a certain number of days, is personally cited—whether that of itself is enough to sustain jurisdiction. Looking to the time the defender lived at different places, and the way in which his residence was continued, I am disposed to think that his residence is sufficient to sustain jurisdiction.

LORD CUNNINGHAME. If the jurisdiction of this Court over the defender rested only on the ground that he had a legal *domicile* in Scotland, by a residence in a dwelling of his own for more than forty days, I should have paused in differing from the Lord Ordinary. I have not come to an opposite conclusion from your Lordship on this point; but looking to the authority of *Ersk.*, b. i., t. 2, § 16, I should hesitate to say that a stranger and a *foreigner* would in general be subjected to our jurisdiction *ratione domicilii*, by a temporary visit to Scotland, though prolonged beyond forty days, under the circumstances which here occur.

But I feel with your Lordship, that there are specialties in the present case established and *admitted* beyond doubt, which attach great doubt to the validity of the objection to our jurisdiction, without renouncing or disregarding one of the most ancient sources of jurisdiction recognized in law. The defender admits that he is a *native* of Scotland; he still remains under the allegiance of the Queen; and I am not aware that he is the subject or citizen of any other sovereign state; he has been *personally cited* to appear before the Supreme Court of his native country; and under the combination of circumstances which thus occur, I am of opinion that he cannot repudiate or decline the jurisdiction of this Court. The jurisdiction recognised in previous cases, may be illustrated by our practice in another branch of our practice of daily occurrence; where either a foreigner, or a native after long absence, repairs to this country, he is notoriously subject to instant apprehension as in *meditatione fugæ*, if it be suspected that he intends to continue his sojourn out of the country. In such cases, there must be *personal service* and apprehension; and, in general, the alleged debtor must find *caution* to enter appearance in any action to be brought against him in our Courts within six months. That affords a strong illustration of the effect given to *personal citation*, as to the ground of jurisdiction against strangers of all classes, accidentally found within our territory.

LORD IVORY. I am of the same opinion. I would rather be disposed, if it

were necessary, to rest the judgment precisely on no one ground—to take the special circumstances of the case. I think the continuity of this party's residence in this country for nearly sixty days, in a house of one of his agents in this country, and therefore to a certain extent the seat of his business, was not disturbed by his visits to his father, to London, and Ireland. When he was away on these occasions, he left his things in his house. Domicile of citation is one thing, but is not necessary where the party is personally cited. It is not necessary when personally cited, that the party should have resided so long as forty days. It is enough that the Court had jurisdiction over him at that moment. We have here personal citation, which was the desideratum in the case of *Pedie v. Grant*, and we have also the allegations which are quite sufficient as to the relation in which these parties stood. There is the *ratio contractus*, the *ratio originis*, and the personal citation. Therefore I am clear that this interlocutor should be recalled.

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The Court “repel the preliminary defence; find the defender liable in the expense of the discussion, and proof in reference thereto; and remit to the Lord Ordinary to proceed farther in the cause,” &c.

Duncan and Dewar, W.S., Agents for Pursuers and Reclaimers.

L. M. Macara, W.S., Agent for Defender.

(J. S. M.)

SINCLAIRS v. RORISON & OTHERS.

No. 62.

Trust-settlement—Construction—Repudiation—Liferent and Fee.—By trust settlement £800 was provided by the truster to be paid to each of two daughters, and which sum was to be laid out on heritable security for their family. The deed bore “it is understood that I include their mother's shares in the above sums.” One of the daughters repudiated the settlement, and claimed her share of her mother's portion of the goods in communion, and her legitim. Her children claimed that the £800 should be set aside for them as belonging to them in fee:—Circumstances in which held, that from that sum there fell to be deducted whatever sum the truster's daughter might be found entitled to as her share of her mother's portion of the goods in communion.

This was a process of multiplepoinding and exoneration, raised in the name of the executors of the deceased Duncan Sinclair, against his daughter Mrs Sinclair or Rorison, and others, under the following circumstances. The late Duncan Sinclair, tacksman of Glense, made a holograph will in these terms:—“I now make my will in the name of God, Son, and Holy Ghost as follows: Margaret, my eldest daughter, to have £800 sterling, and Nancy my youngest daughter, to have £800 sterling, and the principal of the above to be lodged in heritable security, or in the Bank of Scotland, during their life, there to get the yearly interest of it; and if they marry, and have a family, if any of them dies without a family, the principal to return to her sisters and brothers, equally divided among them; it is understood that I include their mother's shares in the above sums,” &c. The youngest daughter Nancy, now Mrs Rorison, has repudiated her father's testament, and claimed her share of her mother's portion of the goods in communion, and her *legitim*, or otherwise she claims the sum of £800 provided to her by her father's will in absolute fee. A claim was put in for Miss Jane Russell Rorison, Mrs Rorison's only child, and on behalf of the children *nascituri* of the marriage, that the £800 should be set aside for them in like manner, as if Mrs Rorison had not claimed

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Dec. 11. 1852. her share of her mother's succession. The question therefore came to be; What effect is to be given to this provision in the settlement? "It is understood that I include their mother's share in the above sums."

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Rorison, &c.

A record having been made up, the Lord Ordinary (Murray), ordered cases to be prepared.

For Miss Jane Russell Rorison, and the children *nascituri*, it was argued that the clear import of the provisions of the will is to limit their mother to a liferent, and to give them a fee. Thus Mrs Rorison's children have an interest entirely separate and distinct from that of their mother, who, by electing to take her legal rights, cannot thereby sacrifice the interest of her children. *Ewan v. Watt*, 10th July 1828, 6 S. and D. 1125; *Fisher v. Dixon*, 24th Nov. 1831, 10 S. and D. 55; affirmed, 1st July 1833, 6 W. and S. 341; *Collier v. Collier*, 6th July 1833, 11 S. and D. 912. What the testator here meant, simply was, that the provision of £800 was to be taken as in satisfaction of Mrs Rorison's claim for a share of her mother's executry. It could not mean that any particular or hypothetical sum was to be held as her share of her mother's succession, and included as such in the £800; and at any rate the matter would resolve into a *legatum rei alienae*, in favour of the grandchildren, in so far as the will, if followed out, would give the grandchildren the fee of a sum which truly belonged to their mother; Bell's Prin. § 1182.

For Sinclair's executors:—There is no technical liferent here, and therefore there can be no correlative fee; wherever there is the one there must be the other also. According to the obvious meaning of the testator, the claim of the children was entirely conditional or contingent on their mother's adopting the settlement and accepting of the provision. There is nothing whatever in the settlement to indicate, directly or indirectly, that the £800 should be preserved in bank, whether the mother accepted of the provision or not. Otherwise, who would get the annual proceeds or interest? Not the children, for it is the principal alone that is to go to them. Nor can it be their mother, who repudiates the settlement, for that would be allowing her both to reprobate and approbate the testator's settlement. Therefore Mrs Rorison's children cannot be found entitled to the £800, while Mrs Rorison herself repudiates the settlement, and besides her *legitim*, claims her full share of her mother's half of the goods in communion.

The Lord Ordinary (Murray), held, "that in setting aside the sum of £800, provided to be laid out in heritable security for the family of Mrs Rorison, in terms of the last will and testament of her father, there shall be deducted therefrom whatever sum Mrs Rorison shall be entitled to as her share of her mother's portion of the goods in communion, and that the residue shall be invested in heritable security, or in the Bank of Scotland, during the lifetime of Mrs Rorison, and at her death, divided equally amongst her family—or if she die without a family, the principal to return to her sisters and brothers, in terms of the will and settlement of the said Duncan Sinclair." And the interlocutor also contained certain findings with regard to a transaction which the Lord Ordinary held to effect a collation of his right by one of the sons, as against his father's estate, and his Lordship further dealt with the *legitim* on that footing.

Against this interlocutor a reclaiming note was presented on behalf of Miss Jane Russell Rorison, and the children *nascituri*.

Monro, and the *Solicitor-General*, for the reclaimers.
Macfurlane, and *H. Robertson*, for the respondent.

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THE LORD PRESIDENT. In this case the interlocutor of the Lord Ordinary deals with two things, (1), the provision of £800, and, (2), the question of collation. On the first question, I concur in the view which has been taken by his Lordship, in so far as he finds that whatever sum Mrs Rorison may be entitled to as her share of her mother's portion of the goods in communion, is to be deducted from the sum of £800. This I think is the fair import of the will. Looking at the terms of it, it is plain that the £800 comprehended the mother's share of the portion of the goods in communion. The case of *Fisher v. Dixon* is not, in my opinion, a case in point. It was a pure case of liferent and fee; the provisions composed of one entire sum, and not declared to be composed of or comprehending any particular items. In this case it is said to include two elements, which are exposed to two separate contingencies. Without farther argument, however, I would not be disposed to confirm entirely that part of the finding, which holds that the sum which is to go to Mrs Rorison's children is to be invested in heritable security till her death, and then to go to her brothers and sisters, if she leave no family. I do not think it is essential to the case. Nor am I prepared to say what is to be done with the interest of the principal sum of £800. It is not a case of lapsed legacy, nor similar to the case of *Peat v. Peat*, 14th Feb. 1839, for here the sum claimed by Mrs Rorison does not come out of the general estate, but out of the particular sum of £800, which was to go to the children. I wish to guard against giving an opinion on that at present.

As to the question of collation, I think the case is altogether in an unsatisfactory state of facts and evidence for deciding that in the meantime. The Lord Ordinary has also dealt with legitim as if collation had taken place. I think, therefore, it would perhaps be better that we should confine our judgment to a special finding in regard to the sum of £800.

LORDS FULLERTON and CUNINGHAME concurred.

LORD IVORY. The only remark I have to make is, that even that course occurs as premature, while it is uncertain whether this lady has elected the one thing or the other; and, therefore, while the case is not in such a shape that we can know whether it is necessary to deal with the construction of the deed. But I think that the Lord Ordinary has put a right construction on the deed, so far as regards the separation of interest between mother and daughter. There is no magic in the words liferent and fee. The question is, whether there is a separation of interest between the parties. What is the amount of the bequest? for it is upon that that the finding of the Lord Ordinary turns. Now, this is not a legacy of £800 absolutely. It is to include within it a certain amount of goods in communion, and as the provision is a *unum quid*, the view which the Lord Ordinary has taken with regard to it is right. As regards the interest on the principal sum, while the mother lived, I rather think that that is an undisposed interest, which, in the event of the mother betaking herself to her legal rights, would fall into the general fund; but if there be any hesitation about it, it is right that it should stand over,

Dec. 11. 1852. and, therefore, I entirely concur in not going further in the meantime than what the Lord President proposes.

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The COURT therefore "refuse the prayer of the reclaiming note, . . . Adhere to the interlocutor of the Lord Ordinary, in so far as it finds that, 'in setting aside the sum of £800, provided to be laid out in heritable security for the family of Mrs Rorison, in terms of the last will and testament of her father, there shall be deducted therefrom whatever sum Mrs Rorison shall be entitled to as her share of her mother's portion of the goods in communion.' *Quoad ultra*, recall in *hoc statu* the said interlocutor, and remit to Lord Rutherford, in room of Lord Murray, to proceed further in the cause as shall be just, reserving, in the meantime, all questions as to expenses of process."

William Alexander, W.S., Reclaimers' Agent.
John Morrison, S.S.C., Respondent's Agent.

(J. S. M.)

No. 63.

KINCAID v. STANTON.

Process—Decree in Absence—Reduction.

1st Division.

Dec. 11. 1852.

Kincaid v.
Stanton.

This was an action of reduction of a decree in absence. The defender lodged defences, pleading, *inter alia*, no process, the summons not having been duly served; and that, as the decree sought to be reduced had been produced in an action of count and reckoning at the pursuer's instance against the defender, and there sustained as a good claim of debt by a decree *in foro*, the pursuer was barred from insisting in this reduction on any of the grounds libelled, which were either competent and omitted, or proponed and repelled in the count and reckoning.

The Lord Ordinary (Murray) pronounced the following interlocutor. "In respect of the new execution, No. 4 of process, repels the first preliminary defence; allows the former execution to be withdrawn from process; finds that this action of reduction is excluded by the proceedings which took place in the process between the parties, in which the decree obtained by the late John Stanton against the pursuer was produced and sustained as a valid decree by a final decree of 13th November 1849, which has not been brought under reduction: Therefore, repels the reasons of reduction, and assoilzies the defender from the conclusions of the libel," with expenses.

Scott, and Pattison, for the pursuer, contended that the case was out of shape. The Lord Ordinary, after repelling the preliminary plea, should have ordered the production to be satisfied.

Mackenzie, for the defender, was not called on.

The COURT adhered to the interlocutor of the Lord Ordinary, in so far as it repelled the preliminary plea; but *quoad ultra* recalled the said interlocutor *in hoc statu*; and remitted to the Lord Ordinary, reserving the question of expenses.

J. Leishman, W.S., Pursuer's Agent.
J. Walls, S.S.C., Defender's Agent.

(J. S. M.)

GIBSON v. EWAN.

No. 64.

Proof—Implied Renunciation of.—Where an interlocutor, of consent remitting to an accountant, bore to be “with the view of finally disposing of the cause,” and the parties had taken a diligence against havers, but had not applied for a proof by parole, and afterwards on reclaiming craved to be allowed additional proof:—Proof refused on the ground that they must be held to have renounced probation.

Intromission—Evidence—Indorsation.—The defender, in an action of count and reckoning for alleged intromissions with the funds of a deceased testator:—*Held* not liable to account for sums drawn from the bank-account of the deceased, where the only evidence of intromission was the indorsation of deposit-receipts, sometimes by the defender singly, sometimes jointly with the deceased.

Intromission—Evidence—Havers—Deposition of.—Where the wife of a defender, when examined as a haver, deponed to the receipt of a bill for L.50 by the defender—*Held* that this deposition was only for the purpose of recovering and tracing documents, and could not be read in proof of the receipt of L.50 by the defender, so as to render him liable therefor.

This case, which was previously partly advised (*ante*, p. 49), was again 1st Division. called to-day, the pursuers having lodged the minute which they had been Dec. 11. 1852. then appointed to do before answer, stating the averments which they proposed to make the subject of a proof. The Court, however, finding that the interlocutor before referred to, of consent, remitting the allegations concerning the furniture to an accountant, bore to be “with the view of finally disposing of the case,” a circumstance they had not observed at the previous advising, held this to imply a renunciation of farther probation, and refused the offer of proof altogether.

Gibson v.
Ewan.

Scott, and the Solicitor-General (Neaves,) for the pursuers, now argued, that the defender was liable to account for, (1.) Certain sums belonging to the deceased, uplifted from bank by the defender, conform to deposit-receipts, some of which were indorsed by the defender alone, and some by the deceased and the defender.

Patton, for the defender, maintained that these sums were drawn by him merely as a *hand*, and must be presumed to have been immediately accounted for to the deceased himself, who was unable to transact his own bank business, and more particularly as the deceased, though he lived many years afterwards, never made any complaint of a short accounting.

The pursuers in reply: There is no proof that the defender had acted as a hand. Besides, even if he had acted as such, he was not in the position of a servant or clerk, but rather of a factor, who must instruct his accounting by vouchers.

The Court held, that the circumstances of the case did not infer liability to account, the presumption being, that the defender had acted for behoof of the deceased, and had accounted at the time.

(2.) A sum of L.50 admitted to have been received by the defender, but alleged by him to have been repaid. The only evidence of this, besides the defender's own admission, was the deposition of his wife, when examined as a haver, who deponed to the receipt of a bill for this amount by the defender.

The Court held, that the deposition of a haver was only for the purpose of recovering and tracing documents, and could not be used in proof of the receipt of the sum in question, not being properly a part of the case at all. The defender's admission must therefore be taken with its qualification.

Dec. 11. 1852. The COURT "find that the pursuer is precluded from now insisting to be allowed a proof of the averments made in said minute . . . refuse the prayer of the reclaiming note, and adhere to the interlocutor of the Lord Ordinary reclaimed against: Find the defender entitled to additional expenses," &c.

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Ewan.

James Bayne, S.S.C., Pursuer's Agent.

Bridges and Macqueen, W.S., Defender's Agents.

(J. S. M.)

No. 65.

POOR DAVID PHILIP v. DIXON.

Expenses—Damages—Tender.—Where the pursuer had accepted a judicial tender of damages, and expenses, the Court, in considering the Auditor's report, allowed the expense of consulting counsel as to whether such tender should be accepted.

See *ante*, vol. i. p. 990.

1st Division. This case now came before the Court on the Auditor's report. The pursuer had accepted a judicial tender of damages and expenses, and in taxing the account of the latter, the Auditor had reserved for the opinion of the Court, the question as to whether the expense of consulting counsel, on the propriety of accepting the tender, ought to be included.

Philip v.
Dixon.

Wilson, for the pursuers, submitted that such expense ought to be allowed.

Patton, for the defender, objected. It was a matter extrajudicial, and therefore not good against the defender as a matter in the cause.

The COURT thought the fee ought to be allowed. This was not a matter altogether extrajudicial, and the rule ought rather to be to encourage parties to take advice at such an important stage of the proceedings. It was a question of prudence, as to which a party was entitled to be advised by his counsel.

Hew H. Crichton, W.S., Pursuer's Agent

Walker and Melville, W.S., Defender's Agents.

(R. S.)

No. 66.

M'GREGOR v. DOBIE.

6 and 7 Will. IV., c. 56, sec. 16—2 and 3 Vict., c. 41—*Cessio—Sequestration—Decree.*—Where a party obtained a cessio and his estate was afterwards sequestered—*Held*, in a competition between the trustee in the cessio and the trustee under the sequestration, as to the balance of a policy of insurance effected on the life of the bankrupt, that the decree in the cessio not containing a decerniture, was not available as a statutory assignment, and, therefore, that the trustee in the sequestration had a preferable claim.

1st Division. This was an advocacy from the Sheriff of Inverness-shire, before whom the case originated in a process of multiplepounding brought by the National Bank of Scotland, the fund *in medio* being a sum of money arising from a policy of insurance effected on the life of the late Mr Dugald M'Lachlan, some time Sheriff-substitute of the Long Island District of Inverness-shire. In 1844, Mr M'Lachlan sued a process of *cessio bonorum* in the Sheriff-Court of Inverness-shire, and obtained decree thereon. In this process, Mr James Dobie was appointed trustee for the creditors, but on the 7th March 1845 a meeting of the creditors was held, at which he resigned the office, and another party was appointed in his room. The regularity of this proceeding, however, having been questioned, another meeting of the creditors was held on the 23d December 1848, when Mr Dobie, with their consent, resumed the office of trustee. Mr M'Lachlan, the bankrupt, died in April 1849. An insurance had been

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Dobie.

effected on his life for L.1000, increased by bonuses to L.1400, but the policy Dec. 14. 1852. having been assigned in security of a debt of about L.600, a balance of between L.700 and L.800 became, on M'Lachlan's death, available to his creditors. This balance was ultimately paid in March 1850 to Mr Dobie, as trustee for the cessio creditors, and of that balance the fund *in medio* principally consisted. On the 8th May 1850 the estate and effects of M'Lachlan were sequestrated under the Bankrupt Act, 2 and 3 Victoria, cap. 41, and in this situation, the competing parties for the fund were Mr Dobie, trustee under the cessio, and the advocator, Mr M'Gregor, who was appointed trustee in the sequestration. M'Gregor v. Dobie.

The Sheriff-substitute (Fraser) sustained the claim of Dobie, and ranked and preferred him to the fund *in medio*; whereupon M'Gregor advocated.

Donaldson, and Moncreiff, for the advocator, maintained that the interlocutor of the Sheriff contained no *decerniture*, that the decree was therefore informal, and not available to effect an assignation under the statute.

Fraser, and Deas, were for the respondents.

The Lord Ordinary (Rutherford) pronounced the following interlocutor:—
 “In respect that there was no conveyance by the bankrupt to the claimant, James Dobie, as trustee under his cessio, and that no decree was pronounced, which, under the Statute 6 and 7 Will. IV., cap. 56, sec. 16, could operate as a conveyance, remits to the Sheriff to recall the interlocutor complained of; to repel the claim of the said James Dobie, as trustee for the cessio creditors of the deceased Dugald M'Lachlan; to sustain the claim of James M'Gregor, as trustee on the sequestrated estate of the said Dugald M'Lachlan; and to rank and prefer the said James M'Gregor, as trustee foresaid, to the whole fund *in medio*, and to decern in his favour in the preference, and for payment accordingly—reserving all claims of preference by any of M'Lachlan's creditors to be made effectual under the sequestration, as accords; and to grant warrant to authorize and ordain the British Linen Company to make payment to the said James M'Gregor, as trustee foresaid, of the sum of L.866 : 19 : 3 sterling, being the amount of said fund *in medio*, deposited in the branch of the said British Linen Company's Bank at Fort-William, in terms of the interlocutor of the Sheriff, of date the 5th of June 1851, with the bank interest that has accrued, or shall accrue thereon, since the date of said consignation, and until payment; and to ordain the clerk of Court to deliver up the deposit-receipt accordingly; and to find the claimant, James Dobie, liable in the expenses incurred by the said James M'Gregor in the competition, and decerns: Finds the respondent liable to the advocator in the expenses incurred in this Court, and remits the account thereof,” &c.

To this interlocutor his Lordship added a note, in which he observed: The advocator's title is not disputed; and his appointment under the statute gives him plainly a right to the whole property of the bankrupt. But the respondent contends that M'Lachlan had been already divested of the policy of insurance, and that the policy, and the sums due under it, stood vested in him, the respondent, for the benefit of the creditors at the time of the cessio, and was no longer *in bonis* of the deceased, or liable to be carried by his sequestration. He founds this plea, not on any actual assignation by the

Dec. 14. 1852. ^{M'Gregor v. Dobie.} bankrupt, but on the proceedings under the cessio, more especially his appointment as trustee, and on the statute 6th and 7th William IV., c. 56, sec. 16. There are many other points in the case which it might be necessary to consider, if the Lord Ordinary was inclined to adopt the view of the respondent, but to which he thinks it unnecessary at present to advert more particularly.

The statute referred to by the respondent gives the effect of assignation to decree pronounced in a cessio; and that assignation, as being both statutory and judicial, would not require intimation to complete it. But it is the *decree* in the cessio that is to operate as a conveyance; and the Lord Ordinary, looking to the proceedings before the Sheriff, finds nothing which is either *technically* or in *substance* a decree satisfying the requirements of the statute. He does not merely proceed upon this, that the Sheriff's interlocutor has a finding only but no decerniture, although he is inclined to think that, in order to constitute a decree, the judgment must contain a decerniture, and be capable of being extracted. But the objection goes much deeper. There is nothing in the proceedings before the Sheriff amounting to the decree required by the 16th section of the Act. There is simply an interlocutor containing conditional and preparatory findings. The Sheriff has not *granted the cessio*; and it would have been quite competent,—assuming that interlocutor to have become final,—to have terminated the proceedings by decree refusing the cessio, if the bankrupt had failed to grant a conveyance upon requisition from his creditors, or otherwise to fulfil the conditions. The Lord Ordinary thinks the decree referred to in the Act of Parliament must be a completed procedure; and he understands that in a process of cessio carried through in this Court, the process, whatever may have been the interlocutory proceedings, always terminates in decree,—and a proper technical decree,—either granting or refusing the cessio.

The Lord Ordinary has felt the case so clear on this view, that he has thought it unnecessary to go further into it.

Of course, the trustee on the sequestrated estate can only take the fund *in medio*, subject to any preference which may have been acquired by other creditors. The Lord Ordinary has no idea that the creditors, before the application for the cessio, can found any preference upon the proceedings under it; but in the circumstances of the case he has thought it right to insert a general reservation.

Dobie reclaimed, but the Court unanimously adhered.

John Walls, S.S.C., Defender's Agent.

L. Mackintosh, S.S.C., Pursuer's Agent.

(R. S.)

M'COWAN v. WRIGHT.

No. 67.

Agent and Client—Confidentiality—Privilege—Act 1621—Conjunct and Confident.—Letters passing between agent and client, in relation to the effecting of a preference in favour of the latter over the estate of a bankrupt, *in fraudem* of other creditors, held not to be protected on the pleas of confidentiality, in a reduction under the Act 1621, and at common law.

This was a reduction of certain deeds in the defender's favour, under the 2d Division. statute 1621, c. 18, and at common law. The pursuer is trustee on the seques- Dec. 14. 1852.
trated estate of James Howie, and the defender is brother-in-law of the bank-
rupt. The issues prepared in the cause were as follows: (admitting the se- M'Cowan v.
questration of Howie, on or about 4th March 1848, the execution of the deeds Wright.
under reduction at their respective dates, and that the defender is brother-in-
law to Howie.) "1st, whether the said deeds and writings, or any of them,
were granted by the said James Howie, to and for behoof of the defender, his
brother-in-law, a conjunct and confident person, without true, just, and
necessary cause, and to the hurt and prejudice of prior creditors of the said
James Howie:" 2d, "whether the said deeds and others, or any of them,
were granted by the said James Howie, in favour of the said defender, frau-
dulently, to disappoint the legal rights of the said creditors?" A commission
and diligence was granted against the defender's Edinburgh agent, as a haver,
for the recovery of various documents, tending to throw light upon the case.

The haver objected, on the ground of confidentiality, to produce certain
letters from the defender to Mr Montgomerie, of the firm of Montgomerie and
Fleming, writers in Glasgow, with answers from Mr Montgomerie to the de-
fender. The Commissioner, Mr Jamieson, Sheriff-substitute of Edinburgh,
sustained the objection, and the pursuer appealed to the Court. The Court,
before disposing of the appeal, remitted to the Commissioner, who had read
the letters, "to report specially to the Court, the parties between whom they
passed, the dates and places at which they were severally written, and far-
ther, to report specially whether the said letters to the obtaining and pre-
paration of the deeds under reduction, or any similar deeds, and to the state
of the bankrupt's affairs, and the defender's interest in the same, at and prior
to the execution of the said deeds, and whether the confidentiality to which
the deliverance of the Commissioner refers, is confidentiality in regard to the
execution of the said, or similar deeds, and as between agent and client at the
date thereof, as in reference to legal proceedings then threatened or expected;
the Commissioner to have in view, that the object of the remit is to enable
the Court to have, if possible, all the materials for disposing of the objection
to which the appeal relates, without reading the letters themselves; but if the
Commissioner thinks that a knowledge of the actual contents of the letters is
necessary to enable the Court to form an opinion, he will so report, or will
give such a view of the nature of the correspondence as he thinks necessary,
and can frame without disclosure of the matter which he holds to be pro-
tected."

The Commissioner reported that there were twenty-nine letters—three to
the firm of Montgomerie and Fleming, sixteen to Mr Montgomerie, and ten by
him to the defender, and stated their dates, which were all between 1st March
and 23d July 1847. That they related, with one exception, to the obligations
incurred by the bankrupt to the defender—his means of discharging them
—and generally, the state of his affairs, and the defender's interest therein,
both before, at, and subsequent to, the execution of the deed sought to be
reduced. That several of the letters related to other business, but all con-
tained matters connected with the defender's claims on the bankrupt. More
particularly, the defender's letters were filled with statements in regard to the

Dec. 14. 1852. *M^cCowan v. Wright.* origin of his connection with the bankrupt, the bankrupt's misemployment of the defender's funds, and the manner in which the latter had been deceived by the bankrupt's misrepresentations. That the defender frequently referred to the bankrupt's promises of payment of the debt due to him, and reiterated his anxiety to get himself secured against the consequences of the bankrupt's mismanagement, and rash speculations in railway stock. That he gave instructions to his agent, in reference to these matters, and made inquiries in regard to the progress of the measures adopted, in order to pay or secure the debt due to him by the bankrupt. That ten of these letters were marked "private and confidential."—That the letters of the agent contained his professional advice on the state of matters between the parties, to the bankrupt's desire to discharge his obligations honourably, and to the progress of the measures adopted by the agent in fulfillment of his client's instructions.

Broun, with whom *Moncreiff*, for the pursuer, now maintained, that, on the insight given by the Commissioner's report, into the contents of these letters, they were not protected by confidentiality. No doubt, they were between agent and client, but the client was now accused of a fraud, and his communications with his agent, in order to obtain his assistance to that fraud, were not protected. *M^cLeod v. M^cLeod*, M. 16,744; *Keith v. Bunyan*, 26th Nov. 1842.

P. Fraser, with whom *Deas* and *Penney*, argued for the defender, that the fraud here alleged was not a fraud, either morally or in the sense in which the word is used in criminal law. It was merely a civil fraud, by which one creditor attempted to obtain a preference over the others, reducible, no doubt, under a statutory enactment, but not morally evil, or punishable as a crime. The communications of a client with his agent, to obtain advice in regard to such a matter, were confidential, and protected as such. *Greenough v. Gaskell*, Mylne and Keen, pp. 102-3; *Lumsdaine v. Balfour*, 18th Nov. 1828; *Greenleaf on Evidence*, v. i., p. 304, *et seq.*; *Chromack v. Heathcote*, ii. Brod. and Bing., p. 4; *Robson v. Kemp*, 5 *Espinasse*, p. 4; *Turquhard v. Knight*, 2 *Meeson and Welsby*, 194; *Lady Bath v. Johnstone*, 12th Nov. 1811, F. C.; *Scott v. Napier*, M. 358. At all events, under these issues, the letters in question could not be got at, for the fraud there referred to was on the part of Howieth the granter, not the defender, the grantee of the deed.

The LORD JUSTICE-CLERK observed, that the proceedings libelled amounted to a fraud, both at common law and under the statute, and therefore to a moral wrong. The statute gave the creditors the right to the motives of the interfering creditor, if "conjunct and confident," and directed the old punishment of infamy against "all who shall give counsel and wilful assistance unto the saids bankrupts." Letters passing between the conjunct and confident person and his professional adviser, in connection with the contemplated fraud, were of the very marrow of the necessary inquiry, and certainly not privileged. He would propose that the whole letters be remitted to Lord Wood to examine and select such as were relevant to the question at issue.

LORDS MURRAY and WOOD concurred, the former observing, that these were communications between a party and his legal adviser in regard to the best mode of perpetrating an alleged fraud, and very different from consulta-

tions in regard to his defence against an accusation of it, or in regard to a pending or threatened suit. On public grounds the latter were protected, but the principle did not apply to the former.

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"Having considered the report of the Commissioner, sustains the appeal; alter the deliverance pronounced by him; ordain the documents referred to in the report of the Commissioner, and called for by the specification against havers, to be produced under seal, and transmitted to Lord Wood; and remit to and request Lord Wood to examine the same, and to order production of all such, or such extracts from the same, as shall appear to his Lordship to fall within the principle of the judgment of the Court, altering the deliverance of the Commissioner."

Thomas Sprot, W.S., Pursuer's Agent.
Andrew Bonar, W.S., Defender's Agent.

(W. H. T.)

M'KELLAR v. M'FARLANE.

No. 68.

Wages, Forfeiture of, by Master of Vessel—Contract, Non-implement of.—The master of a ship having been dismissed for drunkenness, and re-instated on condition of having no spirits on board, violated this condition, and was frequently drunk during the voyage:—Held that he thereby forfeited his wages from the time of his violation of the condition, although he brought the vessel in safety to the end of her voyage.

The pursuer was master of a ship belonging to the defender, on a voyage from Greenock to Trinidad and back, and raised the present action in the Sheriff-Court of Renfrew for an unpaid balance of his wages. The defender resisted payment, on the ground that the defender had so violated his engagement by drunkenness during the voyage as to forfeit all claim to wages. That in particular, on the homeward voyage, he had introduced a large quantity of whisky on board, contrary to express orders given by the defender on re-instating him in office after a temporary dismissal. The charges of drunkenness were indignantly denied by the pursuer. A proof was led, and the Sheriff-substitute decreed for the pursuer. The Sheriff, however, altered this finding, and assoilzied the defender. The pursuer then advocated, and an interlocutor, substantially in his favour, was pronounced by the Lord Ordinary (Colonsay).

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The defender now reclaimed; for whom appeared *Hector*.

G. Young, for the pursuer.

It is unnecessary to enter upon the details of the evidence, as the importance of the case depends entirely upon the principle of law applied by the Court to the facts which they held to be proven; in particular, in rejecting the pursuer's plea, that, even assuming that he took spirits on board for the homeward voyage, contrary to express order, and assuming that he was frequently unfit for duty during that voyage, still, the vessel having under his guidance, performed her voyage in safety, he was to be held entitled to his wages.

The whole import of the decision will be best gathered from the following interlocutor, which was pronounced by the Court, (Lord Murray differing).

"Alter the interlocutor of the Lord Ordinary, except in so far as it advocates

Dec. 14. 1852. the cause, find in point of fact, that after repeated charges had been made by the defender, the owner of the Clydesdale, of drunkenness and habits of intemperance against the pursuer, the master of the said ship, while the vessel was at Trinidad, and various ports of that island, founded on recurrences which called for such warnings, the pursuer was at last dismissed from his situation as the master of the said ship, from which he had been sent back to Port of Spain some days before, on the 21st April, by a letter from the owner of that date, which letter stated expressly the grounds of dismissal to be frequent intemperance, notwithstanding repeated warnings as to the steps which the owner would be compelled to take: Find that though the pursuer was allowed to be on board the vessel for some days on a coasting voyage thereafter, he was not allowed to act, and did not act as master, or take any charge of the ship, but submitted to the footing on which he was placed by the owner as no longer master of the ship: Find that the wages claimable by the pursuer are admitted to be due to him up to the day when he was sent out of the ship back to Port of Spain, and that he was replaced without penalty of forfeiture; the wages may be held to run from said 21st April to 8th May, when entrusted with the ship for the voyage home: Find that soon thereafter the owner did allow the pursuer to resume his position of master, and to take charge of the ship on her voyage back to Greenock: Find that as the condition on which the owner so allowed the pursuer to resume charge as master, he made a peremptory order, before coming home himself in the Mail Packet, that no spirits whatever were to be on board during the voyage home, that the spirits in the ship were thrown overboard, and orders given to the pursuer and whole crew that none were to be on board, and orders to the same effect were given to the ship's agents at Port of Spain, with directions to prevent the pursuer taking any spirits on board, and authority to dismiss the pursuer, if he thwarted the agents, or again became unsteady: Find that such orders were read to the pursuer in the office of the agents: Find that in direct violation of the said orders and condition, and immediately after the owner sailed in the Mail Packet, the pursuer, before leaving Port of Spain, did take spirits on board, and employed the chief officer of the ship to obtain the same, in direct breach of discipline and duty: Find that the pursuer, on several occasions, drank said spirits with said mate: Find that for several days at the commencement, and at a dangerous part of the voyage, the pursuer was wholly unable to perform his duties as captain of the ship, from the effects of the spirits he was then taking, and that several of the crew obtained some of the spirits so long as they lasted: Find that in point of law, that the defender was entitled to lay down any order which he thought necessary for the safety of his ship, and for the maintenance of discipline, and to prevent unsteadiness on the part of the master, as the condition on which the latter was again to be entrusted with the charge of the ship on the voyage home: Find that the master was bound implicitly to obey such order: Find that having, as above found, in point of fact, violated the same, and committed an open breach of discipline in the knowledge of the crew, he has forfeited his claim on that ground on the homeward voyage; further and separately, in point of law: Find, that in respect of the intemperance above found, in point of fact, during the homeward voyage, after being replaced as above, the pursuer has, on this

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ground, forfeited his claim for wages during the said voyage : Therefore repel ^{Dec. 14. 1852.} the reasons of advocacy, of new assoilzie the defender from the claim of the pursuer for wages from and after 8th May on the voyage home, and decern ; ^{M'Kellar v. M'Farlane.} but in respect that there remains a sum of wages amounting to L.18 : 17 : 7, due to the pursuer for the time prior to the 8th May, find the defender liable for said sum, under the deductions specified in the interlocutor of the Lord Ordinary, amounting to L.6 : 8 : 2 ; find the advocator and pursuer liable in the expenses in this Court as in the Sheriff-Court."

P. Graham, W.S., Pursuer's Agent.

W. Muir, S.S.C., Defender's Agent.

(W. H. T.)

SIR ROBERT MENZIES, BART. *v.* THE HON. LADY MENZIES.

No. 69.

Entail—Locality to Widow—Provisions to younger Children.—A locality to his widow being provided by an heir in possession, under power so to provide a liferent not exceeding one-fourth of the lands and estate, in so far as unaffected for the time with prior liferents, and annual-rents of real debts, and after deducting the annual-rents of personal debts, "that do or may affect the same"—*Held* that provisions to younger children were not to be deducted before estimating the locality.

The estates of Menzies and Rannoch were possessed by the late Sir Neil ^{2d Division.} Menzies, under a deed of entail, by which the heirs of entail were empowered ^{Dec. 15. 1852.} as follows :—"It shall be leisome and lawful to the said heirs-male of my body, and the other heirs of tailzie aboye mentioned, to provide and infest ^{Sir R. Menzies v. Hon. Lady Menzies.} their wives by way of locality allenarly, in competent liferent provisions, the same not exceeding a fourth part of the said lands and estate, in so far as the same shall be free and unaffected for the time, with prior liferents and annual-rents of real debts, and after deduction of the annual-rents of personal debts that do or may affect the same." They were also empowered "to grant bonds of provision to their children who are not to succeed to the said tailzied estate, for payment of competent provisions to them, payable and bearing interest only after the granter's death ; providing the same do not exceed three years' free rent of my said lands and estate, in so far as the same shall be free and unaffected at the granter's death by liferents and annual-rents of real and personal debts." It was also provided that children's provisions should not be granted until prior provisions should in whole or part be paid off, so that old and new together should not exceed three years' rent.

In the exercise of these powers Sir Neil Menzies, by his antenuptial contract of marriage in 1816, disposed to the defender in liferent certain farms, in which she was infest soon after. In February 1844 he executed a disposition of locality in her favour, enlarging these provisions, on the ground that they were now less than a fourth of the estate. His widow, the defender, was infest in these lands soon after her husband's death in 1844.

He also, in exercise of the powers above mentioned, bound himself, in the same contract of marriage of 1816, and his heirs of entail, to pay his children, other than the heir succeeding under the entail, such a sum as should amount to three years' free rent of the said entailed estates at the time of his decease, from which time it was to bear interest.

In 1823 he granted a bond of provision corroborative of the above.

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The present action was raised by the heir now in possession against the widow of Sir Neil Menzies, to have it found and declared that "the legal interest of the provisions in favour of the younger children of the late Sir Neil Menzies, which affect the rents of the entailed estates of Menzies and Rannoch, and are payable by the pursuer as heir of entail in possession thereof, must be taken into computation in estimating the provision by way of locality to which the defender is entitled, under the powers conferred by the entail." That therefore it should also be found and declared that the locality lands in which the defender is infest exceeded a fourth part of the entailed estates, as the same stood at the time when her right commenced, and that the provisions, by way of locality, claimed by her, exceeds the provision to which she is entitled under the powers in the entail, to the extent of one-fourth of the interest payable on the provisions to the younger children, and should be restricted accordingly. That she should denude to such extent, &c. &c.

Ross, with whom the *Solicitor-General* (Neaves), for the pursuer, argued that the time at which the lands were to be valued in estimating the locality to widows, was the time of her right commencing, that is to say, the time of the late Sir Neil Menzies' death. The deed of locality had not been delivered, but was found in his repositories; and the words of the entail were, "in so far as the same shall be free and unaffected for the time, with prior liferents, &c." The deeds of provision to the younger children were prior in date to the deed of locality, and the provisions were payable with interest from the death of the grantor, at the first term thereafter, the same time as the first payment under the locality. They clearly fell under the description of debts, "which do or may affect the same," that is, the estate. They therefore fell to be deducted before computing the widow's fourth. The children's provisions were "debts," for they were exceptions to the prohibition to contract debts. It was not necessary that they should affect the fee of the estate; the words were general, "the lands and estate." Neither could the word "debts" be held to mean only the debts of the entailer; if so, it would have been so expressed. *Pearson v. Porterfield*, 17th June 1834; *Kennedy*, 11th February 1829; *Agnew*, 24th January 1811, F. C.; *Countess of Glencairn v. Graham of Gartmore*.

Wood, with whom Deas, appeared for the defender.

The LORD JUSTICE-CLERK, observed that this case did not appear to him to depend on minute verbal criticism on the expressions, "lands and estate," "affect the same," and the like. No theory founded on such criticism would be found to apply with consistency to the various parts of the deed. The question might be decided on broader grounds. The entailer was here giving to the heirs of tailzie two powers, the one to provide liferents for their widows, not exceeding a certain proportion, and the other to make provisions for their younger children, not exceeding a certain number of years' rent. These powers were extremely common, and the mode of giving them were matters of familiar style and practice. So were also their limitations, and the deductions to be made before estimating the provisions. They might be stated either in general terms, as "all burdens tending to diminish the next heir's profits," or specially. The present deed was obviously framed on the plan of specially

mentioning the deductions. No deduction not mentioned could be held, by implication, to be intended. Had it been intended that the special burden to be granted in the very next sentence, (and therefore prominently before the mind of the granter), should be deducted, it would most assuredly have been specially mentioned. No doubt, a provision was in a certain sense, "a debt which may affect the same," but not in its origin and character, nor in the sense in which the term debt is used in such deeds. The subsequent statement that no provisions to children should be granted, until prior provisions of the same kind should be in whole or part paid off, shewed that the effect of such burdens was fully in the view of the granter, and had such effect been intended to extend farther, it would not have been left to inference. In relation to the first power, the children's provisions held a place analogous to that held by liferents in relation to the second power. The latter was specially mentioned, and so would the former, if intended. From these considerations, all tending to shew that this deed was framed on the principle of detailed and accurate specification, he could not hold that children's provisions were to be deducted in estimating the widow's locality.

As to the argument founded on the words "for the time," he saw no force in it. These words plainly referred to the actual currency and receipt of the liferent provision, not to the time of its commencement.

LORDS COCKBURN, MURRAY, and WOOD, concurred in holding that the provisions to children were not to be deducted. There was a distinct statement of the deductions in a clause plainly not general but enumerative, and not to be extended by the Court. These provisions did not fall under that list. They might be debts, but not debts "affecting the lands and estate" in the sense here meant.

The COURT pronounced this interlocutor: "Repel the first plea in law of the pursuer, and assoilzie the defender from the whole conclusions of the libel, and decern."

The only point of law, therefore, which was here decided, (but which obviated the necessity of considering any other,) referred to the first plea of the pursuer, which was, that the provisions to the younger children of Sir Neil Menzies must be deducted before estimating the widow's locality.

Hope, Oliphant, and Mackay, W.S., Pursuer's Agents.

James Robertson, W.S., Defender's Agent.

(W. H. T.)

GRAY v. ROBERTSON and McLEAN.

No. 70.

Dwelling-place—Execution of charge—Relevancy.—Averments which were not held relevant to infer reduction of an execution of charge and minute of imprisonment.

This was a reduction-improbation of a charge, and minute and warrant 2d Division. of imprisonment, which had been used at the defender's instance against the pursuer. The chief ground of reduction was, that no charge had been competently served upon or given to the pursuer.

The action in which the decree had been obtained on which the diligence proceeded, was for the aliment of a bastard child, borne by the present defender to the pursuer. It was raised in the Sheriff-Court of Lanarkshire, in 1850,

Dec. 15. 1852.
Sir R. Menzies
v. Hon. Lady
Menzies.

Gray v. Robertson, &c.

Dec. 15. 1852. and the summons served upon him in a public-house kept by him in Brown Street, Glasgow, which was not then disputed to be his proper place of residence.
 Gray v. Robertson, &c.

The charge had been left for him at the same place in October 1851, but he averred in his record in the action of reduction, that it was no longer his dwelling-place or place of business. That he had finally left it in April 1851. That at that time he let the shop to his brother, who took possession, and affixed his own name in place of the pursuer's. That he then went to Liverpool and took his passage in a vessel for Archangel. That the vessel was driven by storm to Tobermory, where he left her, came to Glasgow for two days, and then went to Arrochar, his native place, where he lived with his mother for a short time, and then wrought for Mr Pyle of the Tarbet Inn.

The defender averred that the pursuer had called at his agent's in Glasgow, a few weeks before his imprisonment, and that he then stated that he was living at his former place there with his brother. The fact of his being at the agent's he admitted, but denied the statement. It appeared that he was finally apprehended for incarceration at the said house in Brown Street, Glasgow.

The defenders having pled that these did not amount to averments relevant to the plea of no competent service of the charge, the Lord Ordinary (Anderson) sustained the relevancy.

The defenders reclaimed; for whom *Buchanan*. For the pursuer, *Fraser*.

The LORD JUSTICE-CLERK held that the action must be dismissed, on the ground, that, by the pursuer's own showing, the charge was properly and legally served. It was not a question of domicile, or of jurisdiction, but of the leaving of a charge, which was a notice that the charger meant to act upon the decree obtained. By his own showing, he was leading rather a wandering life, and the messenger had left the charge where he was most likely to get it, where he recently lived, where he was still in the habit of coming, and where he was actually apprehended. It was the nearest approach to a dwelling-place that could be found.

LORD COCKBURN concurred. Enough of Glasgow still adhered to him to make the proceeding good.

LORDS MURRAY and WOOD concurred.

"Alter, and find the allegations in the record are not sufficient in law to infer reduction of the execution of charge libelled on, &c." "Therefore dismiss the action, and decern."

John Leishman, W. S., Pursuer's Agent.

John Gellatly, S.S.C., Defenders' Agent.

(W. H. T.)

No. 71.

OGILVY v. THE EARL of AIRLIE.

11 and 12 Vict. cap. 36, sec. 43—*Entail Amendment Act—Irritant Clause—Construction*.—Where the irritant clause of an entail did not refer to "acts to the contrary;"—Circumstances in which *Held*, that the entail was invalid under the Entail Amendment Act.

1st Division.

Dec. 16. 1852. This was a declarator of freedom from the fetters of an entail, executed in 1716, by David Ogilvy, third Earl of Airlie, of the lands and barony of Auchterhouse and others, on the ground that the irritant and resolute clauses in the deed of entail did not apply to the prohibitory clause, and in particular, that they did not apply to the prohibition against altering the order of succes-

Ogilvy v. Earl of Airlie.

sion, or to the prohibition against alienations and sales; and the pursuer there- Dec. 16. 1852.
fore pleaded, that by virtue of the statute, 11 and 12 Vict., cap. 36, § 43,—
the entail was wholly invalid and ineffectual.

Ogilvy v. Earl
of Airlie.

The prohibitory, irritant, and resolute clauses, are in the following terms:—
“And in Regarde It is our plain Intentione in case of the Restitutione of the
said James Lord Ogilvy our eldest son or that he be found innocent of what
is laid to his charge That he and his foresaids shall enjoy and brooke the saids
lands and Estate free of any burden except debts alreadie contracted or to be
contracted or other deeds done or to be done by us in our lifetime And that it
should not be in the power of the said Mr John Ogilvy our second son and
the airs male of tailzie and provisione @ mentioned by annailzieing or delapi-
dating the estate or by contracting debt or doing any other deed to disap-
point the foresaid event In case of the exceptione thereof nor that the s^d Mr
John Ogilvy or any others of the heirs of tailzie substitute to him should con-
tract debt wadset or dispoine or doe any other deed whereby the immediat sub-
sequent heir of tailzie and the other heirs of provisione may be any wayes pre-
judged in the full and free successione to the Lands Earldom Lordships Bar-
onies teinds jurisdictions her^{ls} bonds and others hereby dispoined It is hereby
specially provided and declared And by the infestments to follow hereupon
Be it specially Provided and Declared that it shall be nowise leisume nor law-
ful To the said Mr John Ogilvy nor to any of the saids heirs male of tailzie
and provisione to break loose alter or infringe the foresaid tailzie and destina-
tione nor the order or course of successione @ written nor Give Grant sell alie-
nat dispoine or wadset under reversione or irredeemably any of the lands Earl-
dom Lordships jurisdictiones Baronies or others for^{ds} or any part or portion
thereof nor to burden the same with any infestments of @ rents or other
yearly duties less or more to be uplifted furth thereof nor to grant any rights
of feu tacks or assedations y^{of} for small and inconsiderable rents nor for
any longer space than during the lifetime of the granter or during the non-
existence of the foresaid event of the said James Lord Ogilvy his being found
innocent or he or the heirs of his body their being Restored nor to Contract
debts or soumes of money nor to give or grant bands obliedgments or other
rights or securities therefor nor to doe or Commit any other fact or deed
Civile or Criminall by which the foresaids lands and Estate or any part or
portione thereof may be apprized adjudged evicted or forfeaulted from them
or any one of them or whereby the order of Successione in the terms of the
tailzie above mentioned may be anywise hindered diverted frustrat or inter-
rupted And In case It shall happen the s^d Mr John Ogilvy or the heirs male
of tailzie and provisions for^{ds} to doe and Committ any such deeds or Contract
such debts The same are hereby declared to be void and null by way of ex-
ceptione or reply without Declarator and of no force Strength nor effect to
burden or affect the lands Earldome Lordships Baronies and others hereby
dispoined In prejudice of the said James Lord Ogilvy and heirs of his body
In case he be found innocent or that he or they be Rehabilitat or restored as
said is or In prejudice of the subsequent heirs of Tailzie herein specified In
case thir presents shall still subsist and Continow And the person so Con-
traveening shall amitt ferfeitt tyne and lose all right and title to the said lands
and Estate and the right thereof free of all such debts and deeds shall fall

Dec. 16. 1852. *Ogilvy v. Earl of Airlie.* accresse to and be devolved in the next heir who should succeed as if the Contraveener were naturally dead And the Contraveener shall be obleidged to denude in his or her favours *omni habili modo* and to make and grant all

writes and rights necessar for that effect or otherways the hail rights and infestments in their names and persons shall from thencefurth *Ipsa facto* become void extinet and null be way of exceptione or reply without necessity of any declarator to follow thereupon And the said next heir may serve heir to the last infest preceding the Contraveener or may pursue such declarators as may be found necessary or use any other way or method that is formall and legall for establishing the right in his or her person the one but prejudice of the other."

The Lord Ordinary (Rutherford), "repels the defences, finds, decerns, and declares in terms of the conclusions of the libel. In respect, no expenses are demanded, finds no expenses due, and decerns." His Lordship added the following note :—"A prejudicial question is raised on the record, but was abandoned at the debate, and indeed is obviously ill founded. The case turns on the validity of the entail.

"The Lord Ordinary is of opinion that the irritant and resolute clauses are ineffectual, particularly as regards the prohibitions against altering the order of succession, and alienation. He is unable to distinguish this case from that of *Lang*, (16th August 1839), as decided in the House of Lords; that of *Sinclair v. Sinclair*, decided in this Court, 26th February 1841; and that of *Murray v. Graham*, decided here, 21st January 1848, and in the House of Lords, 3d May 1849. In all these cases the relative '*such*' was found to have a sufficient antecedent by reference to the immediately preceding part of the prohibitory clause, so as to limit its application, and leave the previous prohibitions unfenced. A very ingenious point was made in argument by the defender's counsel, by reading from the commencement of the prohibitory clause, for the purpose of shewing that in the inductive part of the clause, the word '*deeds*' had a very general signification; and that if the same meaning was applied to the word '*deeds*' in the irritant clause that was applied to it in the inductive part of the prohibitory clause, the reference would be sufficiently broad to cover all the prohibitions, and such was plainly the intention of the entailer. But this argument goes a great deal too far. It may be no doubt true, that according to the principles of construction applicable to such instruments, as laid down in the House of Lords in the case of *Murray* referred to, and in others that might be cited, you are not to make a constrained construction against the natural and grammatical meaning of the words, to limit the application of the fettering clauses, and so cut down the entail. But, on the other hand, if there be two constructions equally grammatical and natural, that is certainly to be adopted which is in favour of freedom and against fetters; and the mere intention of the entailer shall be of no effect unless the expression makes it directly operative. In this instance, the defenders may perhaps shew, that according to one construction, not unnatural or much constrained, the entail may receive effect; but that is the utmost. The Lord Ordinary thinks their construction not so natural as the pursuer's; at all events it is not more so; and therefore the pursuer's must have the preference, being in favour of freedom, if, between any two cases of construction, the balance is to be for freedom, and against fetters."

The defender pleaded that the entail was good, valid, and effectual, in all its clauses, and that the prohibitions were effectual to debar the pursuer from obtaining the decree of declarator sought for.

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of Airlie.

The defender reclaimed.

Blackburn, and *Handyside*, for the reclaimer, referred to the cases in the Lord Ordinary's note, and to *Murray v. Greig*, 6 Bell's Appeal Cases, 440; Lord Chancellor's remarks in that case, p. 446, and to the case of *Leith Hay*, 5 D. 347. The words "such debts and deeds" in the entail, admitted of a general inflexible interpretation.

Donaldson, with whom the *Solicitor-General*, for the respondent, maintained that the construction put upon "such debts and deeds," was to be found in those parts of the entail, where "debts and deeds," were mentioned and described.

LORD PRESIDENT. Adopting, as we must do, the construction which the Lord Ordinary has put on these clauses, I think there can be no doubt as to what we should do here, and even if we had doubt, the benefit of it should be given in favour of freedom. The argument for the defender will not do. I am clear for adhering.

LORD CUNINGHAME. I conceive the present to be a clear case upon the authorities which must be respected in the decision. The legal construction of the term, "facts and deeds," in irritant clauses, when in immediate connection and in juxtaposition with the same words in the close of prohibitory clauses referring to "facts and deeds, civil or criminal, by which the lands may be appraised or evicted," &c., has been so often construed to apply only to political and criminal forfeitures, that a different interpretation, comprehending all the antecedent branches of the prohibitory clauses, is now out of the question. Indeed, the clause in the case of *Lang* appears to me to have been plainly more stringent than the present, as the irritant clause in that instance began with the comprehensive words, "And if they do in the contrary, it is declared that all such debts and deeds shall be void," &c. Here there is no reference to "acts to the contrary," so that the judgment pronounced by the Lord Ordinary on the case is unavoidable.

LORD IVORY thought that the case was somewhat peculiar, and did not altogether fall under the previous authorities, but the presumption in favour of liberty must prevail.

The COURT adhered, and found no expenses due to either party.

J. and W. R. Kermack, W.S., Pursuer's Agents.

George Wedderburn, W.S., Defender's Agent.

(R. S.)

PETITION AND COMPLAINT, DAVID KIDD & OTHERS v. THE MAGISTRATES & COUNCILLORS OF ANSTRUTHER-WESTER.

No. 72.

Burgh, municipal Election in, excepted from Burgh Reform Act, 3 and 4 Will. IV., c. 76, sec. 12, (Schedule F).—Minority—Disfranchisement—Usage of Burgh.—Where, under the sett of a burgh, excepted from the operation of the Burgh Reform Act, 3 and 4 Will. IV. c. 76, sec. 12, (schedule F), there had been an uninterrupted usage of upwards of 100 years, to elect fifteen councillors, and one of the fifteen elected was a minor:—*Held*, (1), that the usage of the burgh for the period had the force of law, and must regulate the proceed-

ings; and (2.) that one of the parties elected having been a minor, the election had been truly of fourteen only, and therefore illegal, null and void, and the burgh disfranchised.

1st Division.

The matter embraced in this petition, (which was followed by answers, Dec. 17. 1852. replies, duplies, and mutual condescendences), related to the election of magistrates and councillors of the royal burgh of Anstruther-Wester, which was held there on 17th September 1851, which election the petitioners complained was illegal, in respect of the minority of one of the councillors elected. The petition was founded on the old election law, as regulated by the Acts 7 Geo. IV. cap. 16, sec. 7; 16 Geo. II. cap. 11, sec. 24, and 14 Geo. III. cap. 81, sec. 1; and it was stated that the burgh was one of those excepted from the regulations of the 3 and 4 Will. IV. cap. 76, sec. 12, (Schedule F), as to the mode of electing the town-councils of burghs, and that the election therefore of magistrates and councillors of Anstruther-Wester, had been in use for upwards of 100 years, to be made under the sett of the said burgh.

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Anstruther.

It appeared that Kidd and the other petitioners were constituent members of the council of the burgh, and they now complained that Daniel Conolly, who took part as a constituent member thereof in the election of magistrates, and other proceedings, was a minor at the time, is still in minority, and will not attain twenty-one years of age, till about February 1853; whereupon Kidd protested against the said election, and whole proceedings thereat. The petitioners therefore prayed the Court to find that Conolly was disqualified either to be elected a councillor, or to take part in the election of magistrates and councillors of the burgh, and that accordingly the whole of the said annual election was illegal, contrary to the sett and usage of the burgh, and to the laws of the land, and was absolutely null and void, and to reduce and set aside the same accordingly. Subsequent to the election Conolly resigned.

The material facts as thus explained, were not disputed, and the case turned upon these two points, *first*, whether the royal burgh of Anstruther-Wester, was included in schedule F. of the Burgh Reform Act, 3 and 4 Will. IV. c. 76, sec. 12, and therefore specially excepted from the regulations therein prescribed for the election of town-councillors of burghs; and, *second*, if so excepted, whether the sett and usage of the burgh warranted the election complained of. The sett of the burgh appeared to be founded on a report by Mr John Cunningham, town-clerk, and recorded in the books of the convention of royal burghs, but at what particular time this report was drawn up, was uncertain. Mr Cunningham died in 1746, so that the date of the sett must have been anterior to that period. The account given of the usage under the sett, appeared to date from 1644, and there appeared to be an uninterrupted usage of about 106 years, of electing fifteen members as the number of the council. If the election of Conolly therefore was incompetent, the practice of the burgh had not been followed.

Fraser, and the *Solicitor-General*, for the complainers, argued that the usage of the burgh had the force of law, and that Conolly's election vitiated the whole proceedings. The council were bound to elect fifteen members, and they chose fourteen, a proceeding against the fundamental principle of municipal law. The legal number must be elected, else there is no election at all, and the burgh becomes disfranchised, and the Crown, as *pater patriæ*, was en-

titled to interpose for its administration. A council of fifteen with a minor Dec. 17. 1852. is no better than a jury of fifteen with a minor. *Hay v. Magistrates of Dundee*, 9th March 1831, affirmed on appeal 17th March 1831; Connel on Election Law, p. 309; Erskine, 1, 7, 83. As to the Burgh Reform Act, the present case was clearly excepted from its regulations. § 12, was on this point both positive and negative. See also § 37.

Macfarlane, and *Deas*, for the respondents. The petitioners here ask for total disfranchisement, and say there is no other alternative. The question, therefore, is a most important one. There is no precedent for what is here contended for. The case of *Hay v. Magistrates of Dundee* was totally different; there the magistrates did not exercise their duty at all, or they did that which their sett did not recognise. See *Jeffrey v. Magistrates of Stirling*, in 1741, Kilkerran, p. 321; *Boyle and Others v. John Cumming*, M. 1857; *M'Kenzie and Others v. Scott*, M. 1881; Connel on Election Law, p. 315, and case of *Anstruther-Easter* there mentioned. As to the 3 and 4 Will. IV., c. 76, we perhaps cannot contend that the machinery of this statute applies to schedule F., and we do not dispute the Election Law stated on the other side. But it was not obligatory on the burgh, under the sanction of nullity, to elect fifteen councillors. There is a distinction between not proceeding to an election, which is a known failure of duty, and electing a party who is disqualified. The disqualification may not be known to any one. It may not be known to the party himself, and the law does not annex penalties to the possibly erroneous acts of innocent parties. This leads to the principle that an election may be voidable and yet not void. Will it be said that in consequence of a mere latent vice the election is void, and the burgh totally disfranchised?

The COURT took time, and this day advised the case.

The LORD PRESIDENT. Looking to sec. 12 of the Burgh Reform Act, I am of opinion that this burgh falls under schedule F. of the 3 and 4 Will. IV., c. 76, and is therefore excluded from its operation. As to the sett of the burgh, I am satisfied that the usage gives fifteen as the number of councillors to be elected. There were not fifteen qualified persons elected; one of them was a minor. The minor resigning does not affect the question at all, but the case must be considered to be in this position, that an unqualified person was elected to make up the legal number of fifteen. We cannot regard minority as a latent disqualification, so that I hold that the election which took place was no better than an election of fourteen. When complaint is made to us within the statutory period, what are we to do? There may be irregularities and wrongs, and these the Court will redress. Here, in regard to this petition and complaint, we have only to determine whether this was a good or a bad election. I have not found any reason to relinquish the opinion that a failure to elect is not an election at all; and I must hold, therefore, that in the present case there has been none.

The other Judges concurred. The case was free from doubt. The election was no longer competent to be completed in any form.

The COURT pronounced the following interlocutor:—"The Lords, having resumed consideration of this cause, find that the said Daniel Conolly, being

Dec. 17. 1852. a minor, was incapable of taking any part in the proceedings for the annual election of the magistrates and councillors for the said burgh of Anstruther-Wester, at the meeting on 17th September 1851; that he was disqualified either to be elected a councillor, or to take part in the election of the magistrates and councillors of the said burgh, and that, accordingly, the whole of the said annual election is illegal, contrary to the sett and usage of the said burgh and the laws of the land, and is absolutely null and void; and reduce and set aside the same accordingly, and decern; find the persons complained against, who have appeared and opposed the prayer of this petition, and proceedings following thereon, liable in expenses, and remit the account thereof to the Auditor to tax the same, and to report."

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Magistrates of
Anstruther.

Jardine, Stodart, and Fraser, W.S., Complainers' Agents.
T. and R. Landale, S.S.C., Respondents' Agents.

(R. S.) -

No. 73

LEWIS v. ANSTRUTHER.

Alimentary Fund—Annuity, Bond of—Aliment, amount of to heir of entail—Disentail.—Where a father in possession of an entailed estate worth L.15,000 a-year, granted a bond of annuity of L.600 in favour of his son, who had consented to disentail, by means of which the father was enabled to borrow a sum of L.80,000, and which annuity was declared to be alimentary:—*Held*, in a question with an adjudging creditor of the son, that such annuity was not excessive, and being declared alimentary, was not affectable by creditors.

Bill, joint obligation in—Bill, reservation as to.—Circumstances in which a discharge granted to the principal debtor in a bill was *held* not to free his son as joint obligant with his father.

1st Division. In this case the pursuer sought to adjudge certain subjects pertaining heritably or otherwise to the defender, viz., a certificate or policy of insurance for L.1500 on the life of Sir Windham Carmichael Anstruther, the defender's father, as also the obligation for payment of the premium on the policy contained in a bond and disposition in security, as also a bond of annuity granted by Sir Windham Carmichael Anstruther for the sum of L.600 *per annum* to certain trustees, for the use and behoof of his son, the defender, and that for payment and satisfaction to the pursuer of three several sums of L.750, L.850, and L.700, contained in and due by two bills drawn by the defender, and accepted by his father Sir Windham, and by a promissory note by the defender, which bills and promissory note were blank endorsed by the defender, and had been duly protested at the instance of the pursuer, the holder of the same.

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The defender averred and pleaded that he was induced to put his name to the bills solely for the accommodation of his father, who was known to the pursuer to be the principal debtor in them all, and who had received whatever value was given for them. That the pursuer had already received payment of or security for the bills, and in particular, that he had granted to Sir Windham a formal and final discharge of the bills, among other debts, and that he did so without the consent or sanction of the defender.

In regard to the bond of annuity for L.600 for his use and behoof, the defender alleged that it was declared by the granter to be alimentary, and not subject to his debts, or affectable by his creditors. He concluded, (1.) That the debts libelled on not being due and resting-owing by him, the adjudication cannot proceed; (2,) That the defender was liberated by the

pursuer's discharge of his father, Sir Windham, the proper or principal debtor in the alleged debts; and, (3.) That the bond of annuity was not an adjudgable fund, in respect of the declaration therein contained; that it was granted for the "defender's aliment," and was not affectable by his creditors. The nature and position of the bond of annuity, and the effect of the discharge by the pursuer of the defender's father will be found sufficiently remarked upon in the note of the Lord Ordinary (Robertson).

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His Lordship pronounced the following interlocutor:—"Repels the defences, in so far as regards the constituting of the debt and alleged discharge thereof to any extent; adjudges, decerns, and declares, in terms of the libel, in so far as regards the bond and disposition in security for L.1500, and policy of insurance libelled on in favour of the defender, dated 13th November 1850, and also adjudges, decerns, and declares, in terms of the libel, in respect of the bond of annuity in favour of the defender, dated 7th November 1850, to the extent of L.200 per annum, to which amount, with interest, as the annuity falls due, restricts the said bond as an adjudgable subject, and the present decree of adjudication, in place of the whole amount thereof, and to the extent of the balance of L.400 a-year, declares the said bond to be alimentary, and not capable of adjudication, and decerns; reserving to the defender, on payment of the debts sued for, to demand an assignation of the debts and securities held by the pursuer from Sir Windham Anstruther, so that the defender may operate his relief as accords: Finds the defender liable in expenses."

To this interlocutor his Lordship added the following note:—"The defender being debtor in the bills libelled on, as drawer or acceptor, the transaction with his father, a joint debtor, in June 1851, which expressly reserves all claim on these bills against him, cannot operate as a general discharge in his favour. It is also clear that the sum of L.1600 paid, was in respect of the separate promissory note, due by Sir Windham Anstruther, and delivered up. No part of the payment is applicable to the bills on which the defender's name stands. He can therefore take no benefit from this transaction farther than he may demand an assignation to the securities when the bills due by him are paid.

"The important question, however, regards the declaration in the bond of annuity, that 'the said annuity of L.600 sterling is an alimentary provision in favour of the said Windham Charles James Anstruther, and that the same shall not be assignable by him, neither shall the same be liable for his debts or deeds, or subject to the legal diligence of his creditors for payment of the debts already contracted, or that may hereafter be contracted by him.' It is no doubt quite competent for a party who makes a grant, to attach such a condition as this, which will be available against all excepting alimentary creditors—a position which the pursuer does not hold. But the present is a very peculiar case. The heir of entail, in possession of a large estate, (stated to be about L.15,000 a-year,) first granted a bond for L.150 a-year in favour of his eldest son, for his clothing, maintenance, and education. This was afterwards raised to L.400 a-year, and finally, by the bond libelled on, an additional sum of L.200 a-year is given. The cause of this additional grant was for a valuable consideration, namely, the defender giving his consent to the disentailing of a portion of the estate, and allowing his father to borrow L.80,000. He might, on the one hand, have withheld that consent, while,

Dec. 17. 1852. on the other, it was not capable of being attached by his creditors. Still, looking at the nature of the bond, it is one capable of being restricted, in so far as it is in excess of a proper aliment. Certainly the case is not to be viewed in the same light as if it were an action against the father to fix a larger allowance than he is pleased to grant, as is the case of *Maule*. But having granted this allowance, is it excessive for a person in the defender's position, and who had incurred debt? This is the true question: and viewing the whole matter, the Lord Ordinary, by restricting the annuity to L.400, and allowing the pursuer to draw payment at the rate of L.200 a-year, trusts he has met the justice of the case. There seems no doubt of the competency of this mode of procedure. *Webster v. Shaw*, 7th July 1826. *Shaw*, 4, p. 809. *Wright v. Harley*, 2d June 1847. *Dunlop*, 9, p. 1151."

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The defender reclaimed.

Boyle, and the *Solicitor-General*, for the reclamer, referred to the case between the same parties of 10th June 1852, (Second Division) which held that a bond by the possessor of an entailed estate, granted to the next heir, on condition of his consenting to disentail, could not be arrested, it being declared alimentary.

Donaldson, and *Penney*, for the respondents.

LORD PRESIDENT. I have studied this discharge, and I cannot see that it frees the son. Thus so far I adhere to the Lord Ordinary's interlocutor. The alimentary fund is a separate question, as to which I am not altogether of the Lord Ordinary's opinion. The bond of annuity on the face of it, bears to be alimentary, and being so, I do not think the L.600 excessive.

LORD FULLERTON. I was rather disposed to take the view of the Lord Ordinary in regard to this alimentary bond, and to consider L.400 a fair limit, but considering the views of your Lordship, and those of the other Division in the case referred to, I do not feel inclined to differ.

LORD CUNINGHAME concurred with the Lord President. The whole L.600 should be declared alimentary.

LORD IVORY had entertained the same doubts as Lord Fullerton, as to the amount of the alimentary fund; but having regard to the considerations mentioned by his Lordship, would not disturb the proposed arrangement for the L.600.

The COURT pronounced the following interlocutor:—"Adhere to the Lord Ordinary's interlocutor submitted to review, in so far as it adjudges, decerns, and declares in terms of the libel, as regards the bond and disposition in security for L.1500, and policy of insurance, libelled on in favour of the defender, dated 13th December 1850, and in so far as it declares the said bond of annuity, in favour of the defender, dated 7th Nov. 1850, to be to the extent of L.400 a-year, alimentary, and not capable of adjudication; but alter the same so far as it adjudges, decerns, and declares in terms of the libel in respect of the said bond of annuity, to the extent of L.200 per annum, and find that the said bond is alimentary to its full extent, and not capable of adjudication to any extent; and decern and declare accordingly. Adhere to the said interlocutor, in so far as it finds the defender liable in expenses up to the date thereof; but find expenses due to neither party in the Inner House."

Hugh Ross, W.S., Pursuer's Agent.

James F. Wilkie, S.S.C., Defender's Agent.

(R.S.)

THOMAS M'EWAN, *factor loco tutoris* to HELEN and MARGARET COMRIE, v. Mrs CRERAR or DRUMMOND. No. 74.

Judicial Factor—Special Powers—Estate of Pupils—Lease, renunciation of.—Circumstances in which, on the report of the Accountant of Court, authority was granted to a factor *loco tutoris* to renounce a lease belonging to pupils.

This case was reported by Lord Curriehill, to whom, as junior Lord Ordinary, M'Ewan, with concurrence of the paternal relatives of the pupils, founding upon the Statute 11 and 12 Vict., cap. 51, and relative Act of Sederunt, presented a note for special powers, setting forth that the estate belonging to the pupils Helen and Margaret Comrie, consisted principally of a nineteen years' lease of the farm of Fintalloch, held by their deceased father, with the crop and stocking on the farm, seven years of which lease had yet to run. That the mother of the pupils was alive and entitled to her share of the moveables left by her husband, the pupils' father. The factor now applied for authority to renounce the lease, on the ground that the possession of the farm had annually entailed loss to the estate, and would continue to do so.

1st Division.
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The factor considered it his duty to report the case to the Accountant of Court, who had issued an opinion, in which he states, that for sometime past his "attention has been directed to the position of this appointment. The pupils are two females. Their mother prior to her second marriage appeared to give herself with exemplary devotion to the management of the farm, but even then, as the Accountant observes from the accounts, without much success in the result."

"Her place can hardly be supplied. But by her second marriage to Mr James Drummond, cattle-dealer, the factor's confidence in her ability or fitness to continue the local management has been shaken. In this feeling some near relatives of the pupils participated, the Accountant believes, with reason. The landlord, Lord Willoughby, is stated to be now willing to accept a renunciation of the lease, of which seven years have yet to run, and the Accountant is of opinion that it would be for the benefit of the pupils to grant the factor authority to renounce the lease of Fintalloch.

The factor had since lodged his accounts, which shewed that the year's operations on the farm were again unfavourable; and in reporting on these accounts, the Accountant stated that he had great doubts of the "right of a factor, or of his prudence in carrying on a farm, where he has it in his power to give up the lease on fair terms, as he believes to be the case in this instance, and he has therefore suggested to the factor to consider the propriety of at once surrendering the lease, selling off the stock and crop, and settling with the widow, and so realising the estate of the wards without further delay."

On these grounds the factor prayed the Lord Ordinary to move the Court to grant him authority to renounce the lease, as at the term of Martinmas 1852.

To this note, answers were given in for the mother, with consent of her husband, James Drummond, denying the correctness of the statement of the factor, as to the condition of the farm, to renounce the lease of which, they maintained, would be very injurious to the estate; but proposing, in order that the interest of the pupils should not be hazarded, (1st), To pay to the fac-

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Drummond.

tor for their behoof the sum of L.10, as a bonus during each of the remaining years of the lease, in consideration of the respondents getting the benefit of the same during that period. This bonus, they stated, was equal to L.140, during the seven unexpired years of the pupil's estate; (2d,) The respondents offered security to the satisfaction of the factor, or of the Court, to pay the rent and free him of all other liabilities connected with the farm during the remainder of the lease, the pupils nominally standing as tenants; and (3d,) They offered to take the whole stocking, crop, and implements of husbandry on the farm, at the valuation of skilled and practical farmers, to be mutually chosen. The respondents added, that they were ready to pay over to the factor, the amount of that valuation, under deduction of what was due to the mother, Mrs Drummond. This proposal, it was stated, was one which the landlord would assent to.

The respondents farther submitted, that for the purpose of realizing as much as possible by a sale, it would be at all events necessary to retain the farm for another year, and they therefore craved the Court, either to allow the arrangement they had proposed by their offer, or only to sanction the surrender of the lease at Martinmas next year; so that in the interim, the farm may be cropped, and the sale take place in the usual manner of a removal from a farm.

Gordon, was for the factor, and concurring applicants.

Patton, for the respondents.

The COURT were of opinion, that the view taken by the Accountant was the correct one. It would be altogether against correct practice to encourage speculations of the kind proposed, and the factor was clearly entitled to renounce the lease. They therefore pronounced the following interlocutor:—
“The Lords on report of Lord Curriehill, Ordinary, having heard counsel in support of the factor's application, and in opposition thereto, and considered the whole circumstances, grant authority to the said Thomas M'Ewan, junior, factor *loco tutoris* to the said Helen and Margaret Comrie, to renounce the lease of the said farm of Fintalloch, as at the term of Martinmas 1852, and decern *ad interim*, and find no expenses due to either party.”

James Buchanan, S.S.C., Agent for the Factor.

Isaac Anderson, S.S.C., Agent for the Respondents.

(R. S.)

HIGH COURT OF JUSTICIARY.

Before the LORD JUSTICE-GENERAL, LORD JUSTICE-CLERK, LORDS COCKBURN, IVORY, COWAN, and ANDERSON.

No. 75.

JENNINGS v. BURNET.

Sabbath, Profanation of—Police offence.—Held that the keeping a shop or place of business open on the Sabbath day, was not a petty crime or offence in the sense of the Glasgow Police Act, and a conviction therefore under such a charge suspended.

Dec. 18. 1852.

Jennings v.
Burnet.

This was a suspension and liberation, at the instance of Jennings, a provision dealer in Glasgow, against Burnet, the Procurator-Fiscal of the Glasgow Police Court. The suspender had been, by that Court, on the complaint of the Fiscal, convicted of keeping open his shop on a Sunday, and “there and then

retailing bread, butter, snuff, and candles, or other goods and articles, in pro- Dec. 18. 1852.
fanation of the Sabbath." The Bailie "finds the complaint proven against
Thomas Jennings. In respect whereof, fines and americates the said Thomas ^{Jennings v.}
Jennings in the sum of one guinea, and failing payment thereof, grants war- ^{Burnet.}
rant to imprison him in the prison of Glasgow, subject to the rules thereof, for
ten days from this date." The fine not having been paid, the suspender was
sent to prison, where he remained till liberated as aftermentioned.

The grounds of suspension and liberation were, *inter alia*, that the Police
Court had no jurisdiction to entertain the case, and that the summary form of
procedure there observed, was not applicable to such a charge.

The COURT at the first calling, and after hearing counsel, ordered liberation
on caution in the meantime, and continued the case to a future diet for further
consideration.

This day the case was again called, when,

Deas, for the suspender, argued that the Glasgow Police Act did not autho-
rise such a charge as this. It was material to look to the major proposition,
and consider whether such an offence could be tried in a Police Court.
Nothing could be more delicate, or more demanding serious inquiry than a
charge of this nature, and it was most inexpedient to hand over the community
to a petty jurisdiction, whose sentence is irreversible, in regard to a matter so
difficult. If it be proper to try such an offence in a Police Court, then a very
large discretion is reposed in the magistrates who sit there, against which there
is no redress. The prosecutor cannot be limited under such a major proposition
we have here, and it would be competent for him to proceed under the old sta-
tutes, the stringency of whose enactments would not suit the present time. It is a
difficult question to say, how far these statutes are in desuetude, and how far not.
If the major proposition in this complaint be good, it is not easy to see where
such proceedings are to stop, and the old statutes might be competently found-
ed on. Counsel referred to the Acts, 1579, c. 70; 1594, c. 201; 1661, c. 18;
1696, c. 41. Are the matters treated of in these statutes to be held to be with-
in the jurisdiction of the Police Court? and yet why not, if this charge be
good? With reference to the Glasgow Police Act, § 264, mere abstract compe-
tency is not sufficient to exclude review in this Court. This Court reviews the
proceedings of all Inferior Courts, not only as to competency, but as to just
consideration. This controlling power, and discretionary review, has been re-
peatedly exercised. It is sufficient to refer to one case, *Prentice and Newbigging*
v. Barclay, 19th June 1843, 1 Brown, 561. There it was said to be a deli-
cate matter to prosecute such a matter before the Sheriff, much less ought such
an offence to have been brought before this Police Court. The violation of
public decency in connection with the offence is a different matter.

The *Solicitor-General* for the Fiscal, and in support of the sentence. It may
be matter of inquiry whether this be a petty crime, or offence, which it is judi-
cious and prudent to prosecute in the way which has been here followed.
Some of the old statutes which had been referred to, were not in force.
These statutes have reference to a period when no other than the Established
Church was tolerated, and it would be absurd to attempt to enforce them at
the present day. But it cannot be conceded, that the profanation of the Sab-
bath, is not an offence; Christianity is the law of the land, and wherever there

Dec. 18. 1852. is an invasion of the sanctity of the day, there is the violation of that law. There was in the present case, an offence, such a breach of the law, of good order and decency, that the magistrates were bound to interfere, and their competency to entertain such a charge, is in conformity with the spirit that dictated these old statutes, and that spirit is in accordance with the opinion and right feeling of the country. We are not pushed to conclude that so grave a matter is not under all circumstances to be dealt with as a petty offence. That cannot be extracted from the spirit or principle of these old Acts. Magistrates have jurisdiction in many matters, which might give rise to nice and difficult questions,—for example, reset of theft, and it might be a nice and difficult question, whether there had been reset. What is set forth in this complaint, is a relevant and reasonable charge, and fit to be redressed.

Jennings v.
Burnet.

Deas. I did not contend that Sabbath breaking is not an offence at all; what I say, is, that it is too great an offence to be so tried.

LORD JUSTICE-CLERK. I do not mean to give any opinion as to whether this is not an offence which may be prosecuted at common law; but I am clear, that it is not a petty offence in the sense of the Police Act, under which it was tried. I have looked over the General Police Act for Scotland, which gives a very full enumeration of the cases that may be tried by the Magistrate, but in that Act there is nothing which amounts to, or comprehends such an offence as the present. This General Act was intended as a pattern of Police statutes, and was passed with a view to supersede all others. It was drawn up with great care, and had it been adopted in Glasgow, the Magistrates there could have had no title to entertain such a case as Sabbath profanation. They have not adopted this Act, and they have prosecuted the suspender under the Act which entitles them to try petty offences; but which does not entitle them to try such a case as the present.

The other Judges concurred; LORD COWAN, however, remarking, that it was impossible not to notice some of the difficulties which had been stated by the Solicitor-General, and he could not forget what had passed in the House of Lords, in *Phillips v. Innes*, 20th February 1837, 2 S. and M'L., 465. In the present case, however, he felt bound to concur with the Lord Justice-Clerk. The Lord Justice-General added, that there might be incidents which might bring such a charge within the Police jurisdiction, but there were none such in the present case.

The Court pronounced the following interlocutor:—

“The Lord Justice-General, Lord Justice-Clerk, and Lords Commissioners of Justiciary, having resumed consideration of this case, and heard parties’ procurators, *hinc inde*, in respect the charge in the libel is not a petty crime or offence in the sense of the Glasgow Police Act, pass the bill, suspend the sentence complained of, *simpliciter*, and decern. Find the suspender entitled to expenses, of which allow an account to be given in, and remit the same when lodged, to be taxed.”

John Leishman, W.S., Agent for the Suspenders.

Campbell and Smith, S.S.C., Agents for the Respondent. (R. S.)

[THE COURT ROSE FOR THE CHRISTMAS RECESS.]

LADY BAIRD PRESTON'S TRUSTEES AND OTHERS, v. VISCOUNT
MELVILLE AND OTHERS, (SIR R. PRESTON'S TRUSTEES).

No. 76.

Liferenter and Fiar—Trust-deed—Construction—Expense of permanent improvements on Estate.—A truster vested his estate in trustees, directing them to make up an annual account, and after deducting “the whole annual out-goings” to pay the balance to certain parties :—*Held* that permanent meliorations, as building and draining, did not form part of the said “annual outgoings,” and were not chargeable against the annual income.

The late Sir Robert Preston, by his trust-disposition and settlement, executed in 1832, vested his estate, real and personal, in certain trustees. The trustees nominated did not accept, but the defenders were appointed by the Court in their place. By the trust-deed, the trustees are directed, *inter alia*, to make up and state an account once in every year, of the yearly rents and profits of the trust-estate, and, “after deducting therefrom the whole annual outgoings of every description,” to pay over the balance in equal proportions to the trustees’ three nieces, Lady Baird Preston, (now deceased) Miss Preston, and Lady Hay, or her husband, Sir John Hay, or to the survivors or survivor of these parties. The trustees were also directed to hold a certain portion of the lands subject to entails thereof, to be afterwards executed by the truster in favour of a certain line of substitutes, but such entail not to interfere with the above-mentioned purpose, during the survivance of any of his said three nieces. The trustees, in the course of their management, expended considerable sums, consisting partly of the ordinary annual repairs necessary for all such property, and partly of extraordinary expenditure, such as the erection of new farm houses and steadings. They charged the expense of these improvements upon the annual income of the estate, divisible among the pursuers.

1st Division.
The Jan. 11. 1858.
Lady Preston's Trustees &c.,
v. Viscount Melville, &c.

The present action was raised by the pursuers, to have it declared that the defenders ought to make up their annual account upon a different principle, without charging such of the improvements as might be held extraordinary upon the annual proceeds, but that such sums should form a charge against the fee of the estates, and that the defenders should be decerned to pay to the pursuers, what had already been so expended, or that the heirs of entail (who were also called as defenders), on succeeding, should be decerned to make such payment, &c.

The Lord Ordinary (the late Lord Dundrennan), decerned in terms of the *declaratory* conclusions of the summons.

The defenders reclaimed, for whom appeared, *E. S. Gordon* and *G. Dundas*, who contended that the intention of the truster was, that all annual out-goings, that is to say, all payments for the benefit of the estate, made in the course of the year, should be deductions from the sum divisible among the pursuers. They were not liferenters properly speaking, and it was therefore a question not to be regulated by the ordinary rules of liferenter and fiar; See *Morison v. Knight's Trustees*, 14th Feb. 1837. The trustee had made no special provision for such expenses, and the trustees had no other means of providing for them.

T. Mackenzie, and *Deas*, for pursuers.

The LORD PRESIDENT was of opinion, that the interlocutor of the Lord Ordinary was correct, so far as it went. It was plain that these expenses did not

Jan. 11. 1853. form charges against the annual proceeds. There might be nice distinctions drawn between the position of these beneficiaries and ordinary liferenters. Lady Preston's Still, they were substantially in that position, and if there was any difference Trustees, &c., v. Viscount Melville, &c. it was all in their favour.

LORD FULLERTON concurred. "The whole annual out-goings" could not be interpreted so widely as to include these expenses. There was no power in the deed providing for such meliorations at all, and they ought to have got the consent of the three nieces before making them.

LORD CUNINGHAME said the case was very clear and simple. The intention of the truster was to make the pursuers liferenters of the most favoured class. At common law, all liferenters are liable for periodical burdens, but not for extraordinary expenditure, or outlay for permanent improvements, as building, extensive drainage, planting of woods, or assessment for churches or mansees. Such were chargeable against the *fee* of the property.

There was no ground for holding that this was not the meaning of the truster in this case. The term "annual out-goings" could not be held to mean such burdens as those above mentioned. Suppose the Abbey of Culross, which was on the property, had been burned, could the trustees have restored that ancient and picturesque edifice at the expense of the liferenters? In the case of *Morison*, the expense for which the liferenters were found liable was that of making up titles, without which the trustees could not have acted—a very different case from the present.

LORD IVORY concurred. Technically, it was not a question of *fiar* and *liferenter*, but it was still more favourable to the pursuers. These permanent improvements could not be charged upon parties having only a temporary interest. The trustees had gone beyond their powers.

"Find and declare that the capital sums expended by the defenders, as trustees, in repairs or improvements, other than and beyond the ordinary repairs on the estates in question, ought not to be charged against or deducted from the annual income of the said estates. To that extent, adhere to the interlocutor of the Lord Ordinary; but recal, *in hoc statu*, the said interlocutor, in so far as it disposes of the declaratory conclusions of the libel other than that contained in the above finding: Remit to Lord Cowan, in room of Lord Dundrennan, to proceed farther in the cause as may be just," &c.

R. Haldane, W. S., Pursuers' Agent.

Dundas and Wilson, W.S., Defenders' Agents. (W. H. T.)

No. 77.

DONALD M'DONALD v. JAMES FERGUSON.

Damages—Privilege—Malice—Want of Probable Cause.—Circumstances proved which were held insufficient to infer malice, and want of probable cause. Both these elements must exist in order to found a claim of damages for accusation of a crime, and consequent legal proceedings. But *previous* or *special malice* is not requisite, a reckless and passionate state of mind being sufficient.

1st Division. The defender sold certain sheep to the pursuer at the Glasgow market. It Jan. 12. 1853. was agreed that the sheep were to be left in a bught by themselves under the charge of a man called M'Phail, until the pursuer should return with the price, on payment of which they were to be delivered. Meanwhile, the sheep M'Donald v. Ferguson. disappeared, and M'Phail was unable to give any account of them.

The defender then having accidentally met the pursuer on the street, Jan. 12. 1853. charged him in abusive terms with having stolen the sheep, conjunctly with M'Phail, calling him "a d——d Highland thief," "a liar," &c., and walked M'Donald v. Ferguson. him to the police office, where he gave him in custody, until enquiry should be made. He then went to the defender's house, and slaughter house, and searched in certain places where sheep were said to be kept, but found none. It was afterwards discovered that the sheep had been removed by another man by mistake. It appeared from the evidence of the police, that when the defender gave the pursuer into custody at the office, he had hold of him, and was in a very excited state, swearing, and directly accusing the pursuer of the crime, and that the pursuer was searched, and put into the place appropriated to felons in such circumstances, to be detained for two hours, that the defender might bring his evidence.

The pursuer raised an action of damages in the Sheriff-Court of Glasgow, and a proof was led, of which the above is an abstract, and the Sheriff awarded the sum of ten guineas. A letter was produced in process, from the defender to the pursuer's agent, in answer to a notice of the intended action, in which he tells him to go on with the action, "that he was ready to meet it sternly, and determinedly," &c. And the expressions in the record evinced the same *animus*.

The defender advocated, and the Lord Ordinary (Robertson), along with various findings in fact, not differing materially from the above statement, found in law, that though malice was averred in the pursuer's record, it had not been proved, and that this was a privileged case, in which malice, and want of probable cause, in preferring the accusation, were necessary to be proved, but not having been established in point of fact, the pursuer was entitled to no damages, and assoilzied the defender.

The pursuer reclaimed, for whom *Logan*, and the *Dean of Faculty (Inglis)*, maintained, that malice and want of probable cause had been not only averred but proved. The accusation was made without the slightest ground of suspicion; the only connection of the accused with the whole matter, being, that he had purchased the sheep, and knew where they were. There was therefore no probable cause. *Previous* malice was not essential to the legal definition of malice in such cases. It was sufficient if the act was performed, as it had been in this case, in an unreasonable and momentary fit of passion. This was not a case of privilege, at least up to the moment of the pursuer being put into the hands of the police it was not. The defender had unwarrantably taken the case into his own hands during the first part of the transaction, and also in making the search.

G. Young, and *Penney*, for the defender, argued, that it was a privileged case, inasmuch as the proceeding, though done by the defender himself at first, was all with the view of judicial procedure, as soon as such became possible. In order to entitle to damages, both malice and want of probable cause must be combined. Neither of them, standing alone, would do. *Previous* malice was impossible, for the parties did not appear to have been previously acquainted, and of malice at the time there was no proof; the defender had only shown a natural excitement consequent upon believing that his property

Jan. 12. 1858. *M'Donald v. Ferguson.* had been stolen. He had what he considered probable cause, this being a very common mode of theft. No doubt his suspicions turned out to be wrong, but he had, or at least honestly believed he had, sufficient grounds for the investigation which he made. See the ruling case of *Arbuckle*.

The LORD PRESIDENT said that this was a case not altogether free from difficulty. The substantive part of the facts proved, was the taking to the police office. What happened in the street was not so disjoined from it as to escape from the alleged privilege, if there was any. He was of opinion that here there was no probable cause for the defender's proceeding. And also that the other requisite element, malice, had been proved. The want of probable cause might afterwards form part of the ground for determining the existence of malice. It certainly did so here, for the defender, having no probable cause, made no enquiry; but in the most abusive manner, and with every sign of recklessness and passion, inflicted the injury complained of. The disposition of mind thus evinced was sufficient to satisfy the legal requisites of malice, which was a thing difficult to define, and might vary in nature according to the case.

LORD FULLERTON concurred. This is said to be a case of privilege. It is not so in the proper sense of the term. When a crime is suspected the injured party is not freed from all obligations to propriety and moderation of conduct, and is not at liberty to attack the suspected person in any manner that his passion may suggest. The two elements of malice and want of probable cause may run into each other, and the one may be proof of the existence of the other. In the present case there had been intolerable license. There was no ground of suspicion except that the pursuer was the purchaser of the sheep. The angry temper of the defender was sufficient malice.

LORD CUNINGHAME was averse to relax the rule that pursuers seeking damages for judicial apprehension must show both malice and want of probable cause. The present case, however, depended on its own specialties. There was an odious charge made, without a shadow of probable cause. But malice also must be proved. The late Chief Commissioner Adam had laid it down that in English practice malice could hardly be inferred from the mere recklessness of the charge; but required some *extraneous* act of hostility, however slight. That extraneous element seemed here to be proved, by the letter written by the defender to the pursuer's agent, and by the evident *animus* of the record, showing a dogged resolution to do injury.

LORD IVORY concurred. Malice did not require to be *special* malice. A general temper of mind such as that evinced here by the defender, who had evidently lost all self-command, was sufficient.

The COURT "Find that the evidence sufficiently establishes in point of fact that the defender did maliciously and without probable cause, charge the pursuer with the theft of the sheep in question, and did take him to the police office, and did cause him to be detained as a prisoner, on said charge, to the loss, injury, and damage of the pursuer: Find that the sum of ten guineas, at which the Sheriff has assessed the damages, is in the circumstances, reasonable and proper, &c., &c."

C. and C. Fisher, S.S.C., Pursuer's Agents.

Patrick Paul, S.S.C., Defender's Agent.

(W. H. T.)

THE SCOTS' MINES COMPANY v. THE LEADHILLS' MINING COMPANY. No. 78.

Process—Act of Sederunt 11th July 1828—Reclaiming Note—Decree by Default.—A reclaiming note against a decree by default must have prefixed to it all interlocutors of proration.

This was a reclaiming note to be reponed against a decree by default, to the 2d Division. regularity of which, it was objected by

Jan. 12. 1853.

Pyper, for the respondent, that the reclaimers had neglected to prefix to the reclaiming note an interlocutor of proration, in terms of the Act of Sederunt, 11th July 1828, § 111, *Dargavel v. Heron*, 25th May 1850; *Thomson v. Innes, hills' Min. Co.* 19th June 1851.

Penney was for the reclaimers.

The LORD JUSTICE-CLERK. We must adhere strictly to the rule laid down in the Act of Sederunt. The irregularity is fatal.

The COURT refused the note with expenses.

Gibson-Craig, Dalziel and Brodie, W.S., Reclaimers' Agents. (J. S. M.)

M'KENZIE & Co. v. HIGGINBOTTOM.

No. 79.

Expenses.—A defender did not dispute his liability, but objected to the amount charged by the pursuer, offering a smaller sum. A remit being made to a skilled witness, his report brought out a sum half-way between the sum charged and the tender. Modified expenses given to the pursuer, but with hesitation.

This was an action for payment of an account for printing. The defender had never denied his liability, but said it was an overcharge, and both privately and judicially made a tender. The Lord Ordinary remitted to a printer of eminence to report. The sum which he reported as due was about half-way between the tender of the defender and the sum demanded by the pursuer. The Lord Ordinary awarded *modified expenses* to the pursuer; on which point the defender reclaimed.

1st Division.

Jan. 13. 1853.

Mackenzie & Co. v. Higginbottom.

H. Pyper, and *N. C. Campbell*, for the pursuers.

R. Macfarlane for the defender.

THE COURT adhered, on the ground that it was inexpedient to disturb the judgment of the Lord Ordinary on such a question, and to encourage reclaiming notes on mere questions of expenses. Lord Ivory, who had been Lord Ordinary in the case in its earlier stage, remarking, that if it had fallen to him to decide the point in the first instance, he should have been inclined to give modified expenses to the defender; and Lord Cuninghame declining to give any opinion.

Alexander Hamilton, W.S., Pursuers' Agent.

Gibson-Craig, Dalziel, and Brodie, W.S., Defender's Agent. (W. H. T.)

No. 80.

PETITION, JOHN CADELL, FOR DISENTAIL.

Disentail—Interlocutor—Erasure.

2d Division.

Jan. 13. 1853. Mr Cadell having presented a petition for the disentail of his estates, with the requisite consents, and lodged the instrument of disentail, the Court pronounced an interlocutor in the following terms:—"the Lords having resumed consideration of the petition of John Cadell, and of the instrument of disentail now produced, interpose their authority to the said instrument of disentail, and grant warrant to the Keeper of the Register of Taillies to record the same along with this decree, and decern." This decree was extracted and recorded along with the instrument of disentail in the Register of Taillies.

Petition John
Cadell.

In the course of certain arrangements connected with the estates which had led to an examination of the interlocutor, it was discovered that the words "Instrument" and "Taillies" contained in it, were written on erasures, and an objection having been stated to the proceedings on the ground of these erasures, Mr Cadell now presented a note to the Court narrating the circumstances, and craving the Court "to grant warrant to the Principal Extractor of Court to re-transmit the petition for disentail and its grounds and warrants to the clerk in the process, and thereafter to pronounce an interlocutor interposing authority to the instrument of disentail, and granting warrant to the Keeper of the Register of Taillies to record the same along with the decree."

Deas was for the petitioner.

The Court agreed to grant the application as perfectly competent, but intimated that they were by no means to be considered as in any degree holding that the erasures in question vitiated the decree, or that the objection stated to it was at all well founded; on the contrary, they were of opinion that the decree as it stood was quite valid, but as granting the application would facilitate Mr Cadell's arrangements, they had no objection to doing so, and they accordingly granted warrant for the re-transmission of the proceedings, and thereafter repeated their former interlocutor.

Hughes and Milne, W.S., Agents.

(J. S. M.)

No. 81.

BRITISH LINEN COMPANY'S BANK v. R. ALEXANDER.

Joint Adventure—Liability—Bill of Exchange.—A., B., and C. agreed to purchase stock, in which they were to have equal shares,—profit and loss. The price to be raised, the one half by bills drawn by A. upon C., and the other by bills drawn by B. upon C. The bills so drawn and accepted were discounted by a bank. B. and C. having become bankrupt, A. held liable, in respect of the joint adventure, for the bills drawn by B., as well as those on which his own name appeared.

1st Division.

Jan. 14. 1853.

Brit. Linen
Co. v. Alex-
ander.

Three parties, viz. Messrs A. A. Gower, Nephews, & Co., Andrew Smith, and the defender, Robert Alexander, entered into a joint adventure for the purchase of shares in the South Wales Railway. They agreed, by letters which were produced in this action, to raise the necessary funds by means of bills—one half by bills drawn by Smith upon the Gowers, and accepted by them, and the other half by bills drawn by the defender, Alexander, also upon the Gowers, and accepted by them—these bills to be discounted by the

respective drawers with a bank, and the proceeds remitted to the acceptors, Jan. 14. 1853. who were to transact the purchase of the shares for behoof of the joint adventure, in which each of the three parties were to have an equal share, profit and loss. Brit. Linen
Co. v. Alex-
ander.

This was accordingly done, the defender drawing several bills on the Gowers for large sums, and Smith doing the same, all of which were discounted by the pursuers, the British Linen Company's Bank; so that on one portion of the bills appeared the names of the Gowers and of Smith, and on another portion the names of the Gowers and the defender. The proceeds of the whole were remitted to the Gowers for the purposes of the joint adventure.

The defender paid the contents of the bills drawn by himself when they fell due; but before two of those drawn by Smith were matured, both Smith and the Gowers became bankrupt.

The pursuers, besides claiming to rank on the estates of the two bankrupts, raised the present action against the defender for the contents of these bills, on the ground, that though his name did not appear upon them, they were discounted for the purpose of a joint adventure in which he had a share.

The Lord Ordinary (Wood) decerned in favour of the pursuers, and the defender reclaimed;

For whom *Penney*, and *Deas*, maintained, that the purpose to which the money thus raised had been applied was an irrelevant consideration. No names but those of the Gowers and Smith appeared on these bills, and the pursuers, in discounting them, must be held to have trusted to their credit only, and to have known nothing of the agreement to purchase railway shares, which the three parties had entered into. That agreement was, that each should bring so much capital raised upon his own credit. There was no contract to raise it by these particular bills upon this particular bank. It was not a partnership in which the different members were bound for each other. Admitting that goods, the subject of a joint adventure, might be liable for debt incurred in furtherance of the speculation, money was in quite a different position. All the authorities laid down this distinction; see *Collyer on Partnership*, p. 316 to p. 320, and cases there cited.

T. Mackenzie, and the *Dean of Faculty (Inglis)*, for the pursuer, maintained the liability of the defender. It was a limited partnership in which there might be *latent* partners, but not the less liable for debts proved to be incurred in relation to the adventure. It was the same as the stock of the joint adventure, which would have been liable, and on which the creditors of the adventure would have preferable claims; II. Bell's Com. 240; *Cowan*, Nov. 1790; *White*, 12th Jan. 1841. The Gowers were *prepositi*, and had a mandate to accept and to bind all the parties.

LORD FULLERTON had no doubt that the Lord Ordinary's judgment was right. A case falling without the rule might easily be supposed, as, for example, where the money was raised without the slightest reference to the particular speculation, but came accidentally to be employed in it. But here the purpose was specific, and the mode of raising the price of the shares formed part of the contract.

Jan. 14. 1853.

Brit. Linen
Co. v. Alex-
ander.

LORD CUNINGHAME concurred. To hold otherwise would be a subversion of the most positive and salutary rules of partnership and joint adventure. It is quite the converse of several persons merely agreeing to raise, by their own separate means, the funds necessary for paying their respective shares. These parties had *no funds*, and made no advance. The whole project was begun and carried on by a system of credit, and it was part of the contract that two of the partners should raise the funds by drawing on the third.

LORD IVORY concurred, observing, that the distinction drawn between money and goods would not hold in this case. In general, money, when raised, might be used in any manner the borrower chose, but here they were bound expressly to throw it into the joint adventure. The raising of it was a company transaction.

The **LORD PRESIDENT** concurred.

The COURT therefore adhered.

Hunter, Blair, and Cowan, W.S., Pursuers' Agents.

W. A. G. and R. Ellis, W.S., Defender's Agents.

(W. H. T.)

No. 82.

DOUGLAS v. BRAND AND BROWN.

Bill Chamber—Suspension—Competency—Expenses.—Where a charge was withdrawn before a note of suspension was presented, *held* that such note of suspension was incompetent.

2d Division.

Jan. 14. 1853.

Douglas v.
Brand, &c.

This was a suspension of a charge for payment on a bill, given at the instance of the incorporation of dyers of Glasgow, against the suspender Douglas, resident in Glasgow. On the 19th of April, being a Saturday, the agent for the chargers intimated to the agents of Douglas, that the charge was withdrawn. In reply, Douglas' agent wrote, that previous to receiving this intimation "the note of suspension for Mr Douglas had been despatched to my Edinburgh correspondent, and I will receive it back in due course, with the necessary *sist*, which will be at once served, unless you instantly settle all expenses. I presume you had as little authority writing me, withdrawing the charge you caused be given to Mr Douglas, as you had for ordering it to be done; and the suspender looks to you for redress, for the injury done to his feelings, and anxiety of mind caused by your unjustifiable proceedings against him." The note was marked as *fee-fundd* on 21st April 1851, and the *sist* was of the same date. A record was made up, and the Lord Ordinary (Cowan), "In respect of the charge having been withdrawn prior to the note of suspension being presented, dismisses the suspension, and decerns, finds the respondents entitled to expenses," &c. In the note appended to this interlocutor, his Lordship remarked that had the withdrawal of the charge taken place after the suspension was presented, the suspender would have been entitled to insist on payment of expenses before the suspension was dismissed in respect of such withdrawal; vide *Henderson v. Penderleith*, 22d June 1850, and *M'Aulay v. Brown*, 16th February 1833. : . It is considered that he was not entitled to go on with the judicial procedure "for the mere purpose of recovering expenses, which the execution of the charge might have led him to incur. There was, in fact, no charge to suspend when the application was made to the Court on the 21st, and there was, therefore, no propriety, or even competency, in the adoption of steps for suspending a charge which did not exist."

The suspender reclaimed.

Piper, for the reclaimer. Douglas was not bound to know that this party ^{Jan. 14. 1853.} had authority to withdraw the charge, and if he had not power, if Douglas did not present a note of suspension, he was liable to be imprisoned. He was ^{Douglas v. Brand, &c.} not bound to incur a risk of that kind, and, therefore, there was no incompetency in the procedure. Besides, he could only get his expenses by getting the note passed.

Scott, and *T. Mackenzie*, for the respondent, (charger).

The LORD JUSTICE-CLERK. The charge here is withdrawn by the same party who gave it. The suspension was therefore incompetent. As to the expenses, the party might bring an action for the expenses that had been incurred.

The other Judges concurred.

The COURT therefore "refuse the reclaiming note, and find the respondent entitled to additional expenses."

Alexander Hamilton, W.S., Complainer's Agent.

John Gellatly, S.S.C., Respondents' Agent.

(J. S. M.)

MANUEL v. MANUEL.

Quadrimum Utile—Minority and Lesion—Nullity of Deed.—Reduction of a deed ^{No. 83.} granted by a minor with consent of his father as curator, with concurrence of no other curator, and said to be for the sole behoof of the father, is not barred by the lapse of the *quadrimum utile*.

This was a reduction of a bond and disposition of heritable property, bearing ^{1st Division.} to be in security of a loan, and to be granted by "John Manuel, senior, ^{Jan. 15. 1853.} John Manuel, junior, James Manuel, and Robert Manuel, all sons of the said ^{Manuel v. Manuel.} John Manuel, senior; and by the said James Manuel and Robert Manuel, ^{Manuel v. Manuel.} with the special advice and consent of the said John Manuel, senior, our father, as our administrator-in-law, and by the said John Manuel, senior, as taking burden on him, for the said James Manuel and Robert Manuel, my sons." They bind themselves conjunctly and severally for the sum lent, and then follow all the usual clauses of an heritable bond, in favour of the defender, William Manuel, brother of the elder, and uncle of the younger obligants, who was accordingly infeft in the property conveyed. This bond had been made the subject of an action of mails and duties, on the allegation that neither principal nor interest had been paid since its date. The father and one of the sons, James Manuel, had defended the action, on the ground, *inter alia*, that the bond was null, having been granted by the two minors, James and Robert, to their lesion, and solely for behoof of their father, their administrator-in-law, and without the concurrence of any other administrator.

There being difficulty in maintaining this plea, *ope exceptionis*, James Manuel brought the present reduction of the bond, on the ground above stated.

The defence to the reduction was, that the bond was, *ex facie*, valid, and not challengeable upon any intrinsic grounds, and that the reduction was barred by the lapse of the *quadrimum utile*, which was admitted to have expired.

The Lord Ordinary (Rutherford), pronounced an interlocutor, finding "that the expiration of the *quadrimum utile* cannot be pleaded in bar of the present action, nor to the effect of excluding the pursuer from a proof of his averments," and appointing the parties to prepare issues. His Lordship

Jan. 15. 1853. stated in a note, that he held this opinion in respect that he could not look upon the ground of challenge, as simply minority and lesion, (in which case the lapse of the *quadriennium* would have been a good defence), but as a ground inferring the absolute nullity of the deed, as being granted by a minor, with concurrence of his father as curator, for the benefit of the father alone. The bond proved the minority of the pursuer, and that the father acted as curator, and that, to a certain extent, the father was acting for his own benefit; while there was an offer to prove that it was *entirely* for the father's benefit, the minor being merely a cautioner, and that all this was known to the defender, when he took the bond. See cases of *Sir G. Mackenzie*, 7th Dec. 1666, M., p. 8959; *Thomson v. Pagan*, 3d July 1781, *M'Gubbin*, 5th March 1852, and Bell's Prin. 2090.

Manuel v.
Manuel.

The defender reclaimed;

For whom appeared *D. Mackenzie*, and *T. Mackenzie*, who argued that this was an ordinary case of minority and lesion, that there was no *ex facie* or *intrinsic* nullity of the deed, and therefore the lapse of the *quadriennium* was available; *Bannatyne*, M., 8983.

E. S. Gordon, for pursuer.

The LORD PRESIDENT observed, that he considered the cases of *Sir G. Mackenzie*, and of *Thomson v. Pagan* as settling the question in favour of the Lord Ordinary's judgment. The only conflicting case was that of *Bannatyne*, which stood between the others in time, but was so special in its facts as to be of no authority in the present case.

LORD FULLERTON concurred. There is a kind of puzzle about deeds *ipso jure* null, and it seems to be maintained that any deed requiring an action to reduce it does not fall under that category. But that is not the real distinction in relation to the effect of the *quadriennium utile*. Though the party brings his action after the lapse of four years, yet, if he states facts *inferring nullity*, he is not barred. The bond is null, if granted by a minor for behoof of his father acting as his curator, for the latter cannot be *auctor in rem suam*; and this may require an action to prove it.

LORD CUNINGHAME concurred. As the case was libelled, the bond was granted by minors, with consent of their father, with whom they lived, to an uncle as the alleged creditor, without consideration paid to themselves, and solely for behoof of the father, which fact was said to be known at the time to the defender. If these allegations were true, it was a case of legal fraud (if not also of moral wrong) for which the injured parties were entitled to redress at any time within the years of the long prescription. Persons above majority had redress for forty years against a wrongdoer and his accessories in case of wilful imposition, and, *a fortiori*, children must have the same privilege, when betrayed by their legal guardians. The authorities cited by the Lord Ordinary were conclusive.

LORD IVORY concurred.

The COURT "adhere, and remit to the Lord Ordinary to proceed further in the cause as shall be just."

J. Wallace, S.S.C., Pursuer's Agent.

W. A. G. and R. Ellis, W.S., Defender's Agents.

(W. H. T.)

This day, JAMES MONCREIFF, Esq., presented his commission as Lord Advocate, in room of John Inglis, Esq., and took the usual oaths. 1st Division.
Jan. 18. 1853.

EVERITT v. SCOTT.

No. 84.

Act 13 Geo. III, c. 54, sec. 3—Illegal possession of game—Conviction—Seizure of game in modum probationis.—In a prosecution at the instance of the procurator-fiscal of a Justice of Peace Court, (under sec. 3 of the Act), or (against an unqualified person for having game in his possession), the game was seized in *modum probationis* by the fiscal, who was also superintendent of police. After conviction, restitution of the game was demanded:—*Held*, that the prosecutor was placed by the statute on the same footing as a common informer, and that as the statute contained no provisions for the seizure or forfeiture of the game, the seizure of it by him was illegal, and he was bound to restore it.

This was an advocacy from a judgment of the Sheriff of Roxburgh, in an 2d Division. application at the instance of Everitt, the procurator-fiscal of the Justice of Peace Courts of the county of Roxburgh, against Scott, charging him with an infringement of the Act, 13th Geo. III., c. 54. By that Act it is enacted, (§ *Everitt v. Scott*. 3), "That every person whatsoever, not qualified to kill game in Scotland, who shall have in his or her custody, or carry at any time of the year, upon any pretence whatever, any hares, partridges, pheasants, muir-fowl, ptarmigan, heath-fowl, snipes, or quails, without the leave or order of a person qualified to kill game in Scotland, for carrying such hares or other game, or for having the same in his or her custody, shall for the first offence, forfeit and pay the sum of twenty shillings sterling, and for the second, and every other subsequent offence, the sum of forty shillings sterling, and in case of not paying the sum decreed within the space of ten days after conviction, by a final judgment shall suffer imprisonment for six weeks for the first offence, and for three months for the second and every other subsequent offence." The petition prayed for the imposition of the statutory fine, but did not assert any right of property in the game, or call for any forfeiture thereof as not belonging to Scott, the offending party.

Scott admitted that he had the game enumerated in the procurator-fiscal's petition against him in his possession, and the Court fined him in the sum of £1 sterling, which he immediately paid. Subsequent to these proceedings, Scott presented an application to the Sheriff, praying to have the game delivered back, as having been illegally taken possession of by the respondent, or to have the value thereof decerned for. In answer to this complaint, the procurator-fiscal maintained that the game was seized as having been unlawfully in the possession of the complainer, contrary to the statute; that he not being a person qualified to kill game, or having leave from any such person, was liable in the penalties thereof; that the respondent was entitled to seize the game in *modum probationis* of that offence, and that the complainer was not entitled to recover, as his property, game, which it was a statutory offence to have in his possession.

The Sheriff-substitute sustained this defence, and, on appeal, the Sheriff adhered.

The complainer advocated.

The Lord Ordinary (Robertson) "Finds that, although the advocator was

Jan. 18. 1853. not a qualified person under the Act 1621, c. 31—he not having a plough-gate of land in heritage—and although he had incurred the penalty of the foresaid Act, 13th Geo. III., c. 54, was yet entitled to assert and hold a right of property in the said game, and that the respondent was not entitled, as a common informer, to seize and retain the same at his own hand, and to deny restitution thereof to the advocator, there being no forfeiture of the same by any statute; and therefore, advocates the cause, alters the interlocutor of the Sheriff complained of, repels the defences or answers to the application hitherto maintained in the Inferior Court, as well as in this Court, and decerns," &c. His Lordship held that a person killing game, whether qualified or not, or whether doing so within his own property or not, although liable in penalties, either for an infringement of the Game Laws, or for trespass, is still at common law the proprietor of the game so killed by him; Lord Stair, b. ii. t. 1, § 53; Erskine, b. ii., t. 2, § 10; Ness on the Game Laws, p. 67; Forbes Irvine on the Game Laws, p. 56.

Everitt v.
Scott.

The respondent (the procurator-fiscal) reclaimed.

Patton, and the *Dean of Faculty*, for the reclamer. Unless the party has legal possession of the game, he cannot advance one step in this application for restitution of it. This is not the case of a proprietor suing for restitution of what had been taken away for the purpose of proving a particular offence. The effect of restitution here, would be, to repeat the statutory offence. This is one of those cases in which we have sufficient elements for saying that the imposition of the penalty carries with it a forfeiture, or at least such a ceasing of possession that it cannot be followed by restitution, otherwise the penalty would no longer be a penalty, but a tax or a license for doing that which the statute prohibits; Forbes Irvine, p. 61; Bell's Pr., § 949; § 36 (First Division).

Watson, and *Pattison*, for the respondent, (advocator). A conviction under the statute leaves the property of the game untouched. This is not an offence at common law. The statute gives no authority to seize the game, and therefore the procurator-fiscal was as much in illegal possession of the game as was the advocator. If, therefore, the seizure of the game was illegal, the procurator-fiscal was illegally depriving Scott of his property. *Anderson v. Campbell*, 28th February 1811, F. C.; *Mitchell & Co. v. Meek*, 29th May 1818, F. C.

THE LORD JUSTICE-CLERK. This is a question of novelty, and is raised on the statute for the first time. The statute contains no power to seize the game, nor does it direct that there shall be any forfeiture of the game. It cannot be doubted that this game was unlawfully seized. The procurator-fiscal can proceed solely as a common informer. It has been said that it was necessary to seize the game *in modum probationis*. The statute has not said so; and it is not necessary in point of fact, and, at any rate, the right to seize is not given in the statute. The general principle contained in the Lord Ordinary's interlocutor should be adhered to.

LORD COCKBURN. I am of the same opinion. This is entirely a matter of statute, and we must adhere to the statute. It says, that a person having game in his possession is to be fined; it says nothing else. It is not said that he can be interdicted, or that any common informer can go into his house and take the game away.

LORDS MURRAY and WOOD concurred.

Jan. 18. 1853.

The COURT pronounced an interlocutor, containing several findings in point of fact; and thereafter "Find, that no plea was argued (by the respondent) to the effect, that the same was not actually in his (the advocator's) possession, or did not belong to him, but was the property of another person, to whom the boxes containing the same were addressed: Find, that though the advocator was not a qualified person under the Act 1621, c. 31, he not having a ploughgate of land in heritage, and although he had incurred the penalty of the foresaid Act, 13 Geo. III., c. 54, the respondent was not entitled, as a common informer, to seize and retain the same at his own hand, and to deny restitution thereof to the advocator, there being no forfeiture of the same by any statute; and therefore advocate the cause, alter the interlocutor of the Sheriff complained of, repel the defences or answers to the application hitherto maintained in the Inferior Court as well as in this Court, and decern; . . . find the advocator, Robert Scott, entitled to expenses; allow him to give in an account thereof; and remit to the Auditor to tax and report.

James Somerville, S.S.C., Advocator's Agent.

Walker and Melville, W.S., Respondent's Agents. (J. S. M.)

FAIRSERVICE or CAIRNS and HUSBAND, v. MARIANSKI.

Verdict—Amendment of—Remit from House of Lords.—Amendment made upon a verdict and the interlocutor applying it, in obedience to a recommendation contained in a remit from the House of Lords.

No. 85.

Two actions, substantially the same, of reduction-improbation, were raised at the instance of the pursuers against the defender. It was agreed that one jury trial should serve for both. The following were the Issues. 1st, In the one cause:—

"Whether, at the dates when the subscriptions and indorsations of the said Alexander Fairservice were adhibited to or upon the writings, numbers 5, 6, 7, 8, 10, &c., &c., of process, or any of them, the said Alexander Fairservice was of weak and facile mind, and easily imposed upon; and whether the defender, taking advantage of his said weakness and facility, did, by fraud or circumvention, or intimidation, procure or obtain the said subscriptions and indorsations, or any of them, to the lesion of the granter?"

2d, In the other cause, the issue was in similar terms applied to a different set of documents.

In each, a verdict was pronounced in general terms "for the pursuers," and an interlocutor applying it in similar general terms was pronounced.

Appeals were taken in each of the cases, by the defender, to the House of Lords, against, *inter alia*, this interlocutor applying the verdict.

The judgment of the House of Lords, after disposing of the other matters appealed, goes on thus: "And it is further ordered that the said appeals do stand over, and that the said causes be and are hereby remitted back to the Court of Session in Scotland, in order that the respondents in the said appeals may make such applications to the said Court of Session, and to the Lord Justice-Clerk, as they may be advised to make, for the amendment of the entries of the verdicts in the said actions respectively

Fairservice &c.
v. Marianski.

2d Division.
Jan. 18. 1853.

Jan. 18. 1853. found for the pursuers, on the issues in the said petitions and appeals mentioned, according to the substance of the actual findings, and to the notes of the Lord Justice-Clerk, and also for such amendment of the application of the verdict in the said actions of, &c., as the said Court may deem necessary, in consequence of any amendment which may be made in the said verdicts."

*Fairservice &c.
v. Marianski.*

(For the observations of the Lord Chancellor and Lord Brougham, see report of this case, 1st July 1852, p. 1108, Vol. I. of these reports, in which it will be seen that the objection taken to the verdict by their Lordships, was, in respect that it was ambiguous, being simply "for the pursuers," while the issue was alternative, "by fraud, or circumvention, or intimidation.")

A petition was now presented by the pursuers to the Court, praying them to apply the judgment and carry into effect the remit of the House of Lords.

Penney, for the defender, maintained that the proceeding recommended by the House of Lords, that the Court should amend the entry of the verdict, was quite unprecedented, and unknown to the practice of the Court.

Deas, for the pursuers, argued that the House of Lords being the Supreme Court in matters of Scotch Law, and having found that such a proceeding was competent, the regularity or irregularity of the practice was no longer an open question, and the Court had now therefore nothing to do but to consider how far, and in what way, it was expedient to proceed in accordance with the recommendation.

The COURT, after some hesitation, altered the entry of the verdict, and the interlocutor applying it, as follows, in the first action, and in the same manner, *mutatis mutandis*, in the second. "At Edinburgh, the 28th, 29th, and 30th days of March 1850, before the Right Honourable the Lord Justice-Clerk, compeared the said pursuers and the said defender, by their respective counsel and agents, and a jury having been balloted and sworn to try the said issue between the said parties, say, upon their oath, that at the dates when the subscriptions and indorsations of the said Alexander Fairservice were adhibited to or upon all and each of the writings, numbers 5, 6, 7, 8, 10, 11, 12, 13, 14, 18, 20, 21, 22, 23, 26, 30, 31, 33, 34, and 132 of process, the said Alexander Fairservice was of weak and facile mind, and easily imposed upon; and that the said defender taking advantage of his said weakness and facility, did, by fraud, and circumvention, and intimidation, procure or obtain each and all of the said subscriptions and indorsations, to the lesion of the granter."

The Lords having resumed consideration of the petition of Mrs Janet Fairservice or Cairns and her husband, pursuers, to apply the judgment and remit by the House of Lords, note for the said Mrs Janet Fairservice or Cairns and husband, to the Right Honourable the Lord Justice-Clerk, and minute therein for the defender, Dionysius Onufri Marianski, interlocutor and deliverance by his Lordship on the said note, and the amended entry of the verdict of the jury, in pursuance of the said deliverance, and having heard counsel for both parties in the cause, apply the said verdict as now entered up, and, in terms thereof, find, that at the dates when the subscriptions and indorsations of the deceased Alexander Fairservice were adhibited to or

upon all and each of the writings, numbers 5, 6, 7, 8, 10, 11, 12, 13, 14, 18, Jan. 18. 1853. 20, 21, 22, 23, 26, 30, 31, 33, 34, and 132 of process, the said Alexander Fairservice was of weak and facile mind, and easily imposed upon, and that the said defender, taking advantage of his said weakness and facility, did by fraud, and circumvention, and intimidation, procure or obtain each and all of the said subscriptions and indorsations, to the lesion of the granter: And therefore, the said Lords reduce, retreat, rescind, cess, and annul each and all of the said subscriptions and indorsations, and the bills, indorsations, and other writings to which they were adhibited, in so far as they are alleged to import any obligation, transference, assignation, indorsation, or other right in favour of the defender, with all that has followed or is competent to follow upon the same, and decern and declare the same to have been from the beginning, to be now, and in all time coming, void and null, and of no force, strength, or effect in judgment, or outwith the same, all in terms of the conclusions of the libel: And the said Lords find, reduce, decern, and declare accordingly, in terms of the reductive and declaratory conclusions of the libel; of new, find the pursuers entitled to the expenses incurred by them prior to the 20th July 1850, the account to be taxed by the Auditor in common form.

William Waddell, W.S., Pursuers' Agent.

Wotherspoon and Mack, W.S., Defender's Agent.

(W. H. T.)

WAUCHOPE v. NORTH BRITISH RAILWAY COMPANY.

No. 86.

Railway Act—Construction.—The term "railway" in the Act incorporating a railway company, used in a clause conferring certain rights upon a proprietor through whose lands the line was to pass, *Held* to apply not only to the main line, but to branches subsequently constructed.

The Act incorporating the Edinburgh and Dalkeith Railway, contained^{1st Division.} the following clause in favour of Mr Wauchope of Niddry, through whose^{Jan. 19. 1853.} lands the line passed: "The said Company shall, and they are hereby required, (in addition to the value of the ground to be occupied by the said^{Wauchope v. N. Brit. Rail.} Railway, to be ascertained and paid in manner hereinafter mentioned,) to pay^{Co.} to the said Andrew Wauchope, and his heirs and successors in the lands and estate of Niddrie Marischall, so long as the said Railway shall continue to be used through the said lands, grounds, or other premises of the said Andrew Wauchope, the sum of one half-penny per ton upon all goods and articles upon which a tonnage-duty is chargeable and charged in virtue of this Act, which shall pass along any part of said Railway situated within the said lands, &c., excepting the coals and other minerals, corn, and other articles, the produce of the said lands and estate, the manure, lime, &c., belonging to or for the use of the said Andrew Wauchope, his heirs, tenants, &c." The Company subsequently constructed, under a special Act, their Fisherrow branch, which broke off from the main line within the pursuer's lands; the Act relating to this branch did not contain any allusion to the pursuer's rights, it declared that the branch should be "taken and deemed to be a part of the said Railway."

In 1845, the North British Railway Company, the defenders, obtained an Act, enabling them to purchase the Dalkeith line and its Fisherrow branch, and to construct certain other branch railways in connection with it.

Jan. 19. 1838. By this statute it was enacted, that from and after the purchase, the Acts relating to the Dalkeith Railway should be repealed, "so far as the same are applicable to so much thereof as may be the subject of such purchase," "saving and reserving, *inter alia*, all rights, powers, &c., and other benefits whatsoever, by the last mentioned Acts, to or on the estate of Niddrie and Edmonstone, or on the persons in possession thereof"

Wanchope v.
N. Brit. Rail.
Co.

The North British Railway then constructed a branch from Edinburgh to Musselburgh, and, for a part of the way, availed themselves of a small portion of the Fisherrow branch, but without using, as far as this part of their works was concerned, any part of the main line of the Dalkeith Railway. The latter now formed a part of their Hawick branch.

The pursuer now claimed his half-penny per ton upon all goods passing along the Musselburgh branch, in respect of its comprehending a portion of the Fisherrow branch of the Dalkeith line. The defenders, while admitting his claim upon the traffic of their Hawick branch, as representing the Dalkeith Railway, denied their liability upon the Musselburgh branch, in respect, that the way-leave originally conferred upon the pursuer did not apply to the Fisherrow branch, but only to the main line of the Dalkeith Railway. They admitted that it had, in a former state of matters, been paid upon the Fisherrow traffic, but explained that by the fact, that at that time it was impossible to get upon that branch except by passing along the main line, so that the present question could not possibly arise.

The pursuer maintained that the term "*railway*," in the original Act of the Dalkeith Company, must be held to include the branches; and, at all events, by the subsequent Act, empowering them to construct the branch in question, it was declared that it should be taken and deemed to be a part of the said Railway.

The Lord Ordinary, (Wood), found for the pursuer, holding that the term "*railway*," in the original Act, applied to the Fisherrow branch as well as to the main line.

The defenders reclaimed, for whom appeared *Penney*, and *Dean of Faculty*, (*Inglis*).

For the pursuer, *Dundas*, and *Neaves*.

The COURT unanimously adhered.

W. Mackenzie, W.S., Pursuer's Agent.

David Smith, W.S., Defenders' Agent.

(W. H. T.)

1st Division. This day, ROBERT HANDYSIDE, Esq., presented his commission as Solicitor-General, in room of C. NEAVES, Esq., and took the usual oaths.
Jan. 20. 1858.

No. 87.

MARQUIS OF AILSA, PETITIONER.

Entail—Montgomery Act, 10 Geo. III., c. 51—*Entail Amendment Act*, 11 and 12 Vict., c. 36—*Improvements*.—Expense of erecting a tile-work, and of repairing two mansion-houses, other than that inhabited by the proprietor, one of them being inhabited by the commissioner, and the other by the factor, disallowed as a charge against the estate under the *Montgomery Act*, and *Entail Amendment Act*.

This was a petition by the Marquis of Ailsa, heir of entail in possession of ^{Jan. 21. 1853.} the estate of Cassilis and Culzean, setting forth various improvements executed by him on these estates, alleged to be of the nature allowed in the Montgomery Act, 10 Geo. III., c. 51, secs. 9, 10, and 27, to be charged against the succeeding heirs of entail, and for which additional facilities are given by the Entail Amendment Act, 11 and 12 Vict., c. 36, secs. 13, 14, 16, 18, 31, 33, &c. The petitioner prayed the Court to authorize him to execute bonds of annual-rent, in terms of the last mentioned Act, for the sums so expended on improvements. Marquis of Ailsa, Pet.

A remit had been made by the Lord Ordinary to W. R. Baillie, Esq., W.S., to examine and report whether the requirements of the statute had been complied with.

From the report, it appeared, *inter alia*, that part of the alleged improvements consisted of the erection of a tile-work, by which not only might the estate itself be supplied with tile for draining, but by which the proprietor might be able to make a profit by the sale of tiles. Part was also stated to be for the repair of three separate mansion-houses, Culzean Castle the residence of the petitioner, Newark Castle which was inhabited by his commissioner, and Maybole Castle inhabited by his factor. All these mansion-houses, it appeared, were within eight miles of each other, and upon estates, which, though originally distinct, were now all held under the same entail.

H. J. Robertson, and A. Boyle, for the petitioner, maintained that the expense of the tile-work ought to be sustained as falling under the general expense of "draining," or, at all events, as an "out-building," allowed by the 9th section of the Montgomery Act. By means of it the tiles were procured at cost price, and had they been bought from the manufacturer, the charge against the estate would have been still greater. In the case of the *Earl of Glasgow*, 27th Nov. 1850, a new engine-house in connection with mines had been allowed. As to the two additional mansion-houses, they had originally belonged to different estates, and were valuable relics which were falling into a ruinous condition, and required the repairs to preserve them. In the case of *Dalrymple v. Stirling*, 14th Dec. 1814, two mansion-houses had been allowed.

The LORD PRESIDENT observed, that he did not think the tile-work fell under the term "out-buildings for the same," used in the Act. It was truly a manufactory, for the purpose of sale as well as for the use of the estate. Nor did it come under the general expense of draining, for it was not an erection of a temporary nature for the *current* operations of draining. It was impossible to go into an accounting to ascertain what would have been the expense had the tiles been purchased. The three mansion-houses did not all appear to merit that name, in the proper sense. A very large estate might have more than one mansion-house, at a great distance from each other, for the use of the proprietor; but two of those in question, whatever was their original history, were now used for the factor and the commissioner.

The other Judges concurred.

"The LORDS, on report of Lord Anderson, and having considered the report of Mr Baillie, and heard counsel for the petitioner, repel the petitioner's claim in respect of the sum of L.847:13:6½, charged as the expense of

Jan. 21. 1853. creating a tile-work, and his claim in respect of the improvements and additions made to Newark Castle and Maybole Castle, and remit to the Lord Ordinary to proceed further as may be just, and to report.

Marquis of Ailesa, Pet.

Hunter, Blair, and Cowan, W.S., Agents. (W. H. T.)

No. 88.

KIDD v. YOUNG and OTHERS.

Expenses—Counsel's Fees.—A debate having been postponed by the Court, and called again sometime after, the senior counsel employed on the first occasion was necessarily prevented from conducting the debate on the second, and another was feed; the Auditor's report, sustaining both fees against the other party, approved.

1st Division. This case, (reported p. 131 of this volume), now came in the form of an objection to the Auditor's report.

Jan. 21. 1853. Senior counsel had been feed by the complainer, for the debate before the Kidd v. Young. Inner House; from pressure of business the case was not heard on the day on which it was put out in the roll. When at last the debate took place, the senior counsel formerly feed, was necessarily absent from Edinburgh, and another was employed. The complainer being successful, obtained decree for expenses, and the Auditor sustained both the above mentioned fees to counsel.

This was objected to by the respondents, but the Court approved the Auditor's report.

Jardine, Stodart, and Fraser, W.S., Complainer's Agents.
T. and R. Landale, S.S.C., Respondents' Agents. (W. H. T.)

No. 89.

CAMPBELL v. PRINGLE AND OTHERS.

Expenses—Co-defenders.—In a cause in which the defenders were very numerous, and were successful on the merits, full expenses allowed to each, in respect that their grounds of defence were necessarily various, so as to preclude them from arranging so as to have agents and counsel in common.

1st Division. The action had been at the instance of the solicitors of an abortive railway scheme, against the individual members of the provisional committee, who were very numerous. The defenders had been successful on the merits, and had obtained decree for expenses.

Jan. 22. 1853. Campbell v. Pringle, &c.

Macfarlane, for the pursuer, now adverted to the Auditor's report allowing full expenses, including fees to counsel, &c., to each of the defenders. They ought to have made some arrangement, by adopting each other's defences, and having agents and counsel in common.

Penney, and the *Lord Advocate (Moncreiff)*, for the defenders, said, that what the pursuer complained of was partly his own fault and partly unavoidable. The pursuer had stated separate facts against many of the defenders, and almost all of them had been obliged to state separate grounds of defence. They were not an incorporated body, but a provisional committee, and were said to have become so in a great variety of ways. It was the interest of each that as many of the others as possible should be implicated.

The LORD PRESIDENT observed, that in many cases an arrangement of the kind alluded to by the pursuer, had been entered into, and had been recom-

mended by the Court, with a hint of serious results in the matter of expenses, Jan. 22. 1853. if it should not be attended to. The present case, however, was peculiar, and looking to the variety of averments, and the necessity of sifting them, he did Campbell v. Pringle, &c. not see how a common agent could have acted for all.

The other Judges concurred, and the Auditor's report was approved of.

J. Murray, Junior, S.S.C., Agent for the Pursuer.

Campbell and Smith, S.S.C., Agents for Defenders.

(W. H. T.)

ROBERTSON v. HENDERSON.

No. 90.

Action of Damages—Criminal Information—Diligence—Recovery of Documents—Protection of Public Prosecutor.—In an action of damages, founded on the allegation that a charge of perjury had been lodged by the defender against the pursuer with the procurator-fiscal of Glasgow, maliciously, and without probable cause, the pursuer moved for diligence for the recovery of all documents relating to such charge. To this diligence objection was taken by the defender, and also by the Lord Advocate, who however did not allege any injury to the public service by disclosing them :—*Held* that in these circumstances the pursuer was entitled to recover the documents presented to the procurator-fiscal.

This was an action of damages, which was reported by Lord Rutherford, 2d Division. under the following circumstances. The summons proceeded on the narrative, Jan. 22. 1853. *inter alia*, that in the course of a previous litigation between the parties to this action, the present defender lodged with the procurator-fiscal of Glasgow a charge of perjury against the present pursuer, in consequence of which the pursuer was apprehended, and, after examination, was liberated on bail. That after full investigation and inquiry made under the direction of the Crown counsel, the charge was found to be groundless, and the criminal proceedings against the present pursuer were abandoned, and that by these proceedings the pursuer sustained loss, injury, and damage. A record was made up : Issues were prepared, and a diligence craved at the instance of the pursuer, for "the documents or writings referred to in process, containing a charge or charges of perjury, preferred or alleged by the defender against the pursuer, and made or sent by him, or by his agents, or others on his behalf, to Mr George Salmond, procurator-fiscal of Lanarkshire, or others on behalf of the said George Salmond, or of the public prosecutor, and in particular, all such documents or writings dated on or about 18th October 1847." A diligence having been granted against havers, objection was taken to the production, not only by the defender, but directly by the Lord Advocate. In these circumstances the Lord Ordinary reported the case.

In the note appended to his interlocutor, his Lordship says—The question does not regard the obligation upon the Lord Advocate to disclose the name of his informant. The informer is known, and assumed to be known. What is required, is the information itself, and that in an action which states the information to have been given maliciously and without probable cause. Further, nothing but the information is wanted. No demand is made for the precognitions, or any proceedings founded upon the information, whether before or after the party was put in charge. . . . Objection is taken to the production, not only by the defender, but directly by the Lord Advocate ; the defender, however, maintains, that if the Lord Advocate cannot be compelled, he is not entitled to produce. But, in the Lord Ordinary's view, the only question of difficulty

Jan. 22. 1853. is with the Lord Advocate. Mr Hume, in treating of the subject, "Prosecutors and their Title," puts the case of an informer and information upon the same ground, and indicates an opinion favourable to the party requiring disclosure, (Commentaries, last edition, vol. ii. p. 134.) Mr Alison gives it as matter of practice that the Lord Advocate is compellable to disclose. The Lord Ordinary would hesitate in assenting to the position, if it were generally laid down that the Lord Advocate must in every case give up the informer and the information. It is not the case of treason only that would form an exception. If that high public officer declared upon his official responsibility, that the disclosure sought, was, in the particular case, in prejudice of the public service, the Lord Ordinary would have been inclined to refuse interposition, and leave the party to his remedy otherwise, however difficult that might be, especially if there was no case against a procurator-fiscal. That seems to have been the view taken by the Lord Chief Commissioner in the case of *Leven v. Young and Co.*, Murray, vol. i. p. 371. But in the present case the Lord Advocate has not stated, and indeed declined to state, that any prejudice could arise to the public service from the disclosure, resting simply upon the general ground that he was not in any case compellable to disclose. The Lord Ordinary thinks that this does present a case of difficulty and importance. The authority of Mr Hume, in the passage cited, seems inconsistent with the plea; and the cases he refers to seem to support his opinion, particularly that of *Steven v. Dundas*, 28th December 1727, M. p. 7905; Moodie & Robertson, vol. i. p. 198, which does not appear to have turned upon any special provision in the statute 1701. The Lord Ordinary certainly is impressed with one difficulty, viz., that the refusal to disclose the information might deprive a party altogether of his remedy, or at least expose him, or probably the defendant, to disadvantage. For the information being written, it would be in one view incompetent to prove by parole its contents—in which case the remedy would either be greatly impeded, or might altogether fail; or, if parole proof of its contents were admissible, the justice of the case on either side might suffer from imperfection of evidence, where in an ordinary case the evidence would have been perfect. No doubt, considerations of high expediency, connected with the necessities of the public service, would overcome all such objections; and the Lord Ordinary would have so viewed the case, if it had been stated on the part of the Crown, that the interests of the public service required the information to be withheld. But the present case does not present that difficulty, and the Court is left very much in the situation in which it would have been placed in the case of *Leven, supra*, if the Lord Advocate had not withdrawn his objection, and with this difference from the case of *Hart, supra*, that there can be no doubt of the necessity of the disclosure for the justice of the case in which it is asked."

As to the defender's plea that the Lord Advocate, if not compellable, was not entitled to produce, "the Lord Ordinary cannot assent to any such doctrine. If the Lord Advocate, in his discretion, chooses to make the disclosure, he cannot doubt the right of the pursuer to use the matter so disclosed. Where the Lord Advocate is willing to make the disclosure, there can be no ground for alleging public interest against it. In lodging what may be termed a cri-

minal information, a party might commit an indictable offence; and certainly Jan. 22. 1853. the Lord Advocate could not be stopped by any plea of confidential communication, from taking judicial proceedings at his own instance against the party who had lodged the information, and to use the information as the very ground of charge. The Lord Advocate might, in many cases, think it for the public interest that malicious accusations should be suppressed, by disclosing the informant, and furnishing the party who had been maliciously, and it might be, feloniously accused, with the means of private redress. It appears to the Lord Ordinary that the only interest to be considered is that of the Crown, as in the hands of the Lord Advocate, and that, if he made production, either voluntarily or under order of the Court, the private party could not be heard to object. The Crown may plead its privilege, but not the private party. The private party has full protection otherwise in the pursuer's necessity of proving malice and want of probable cause."

Robertson v.
Henderson.

Deas, was for the defender.

Logan, and the *Dean of Faculty*, for the pursuer.

THE LORD JUSTICE-CLERK. It is impossible to disguise the importance of this case. The public prosecutor has a large and most important protection. I do not know of any cases, setting aside irregularity, that can subject a procurator-fiscal to the liability of an action, unless it can be shewn that he has conspired with the party to carry on a prosecution on what he knew to be false information. Now that protection is founded on this. In his duty he is supposed to be influenced only by the necessity of the case. He may act on his own responsibility and without information, which, however, the earlier law did not contemplate; but if the public prosecutor has received information charging a person with crime, he may exercise his discretion as to the mode of enquiry, but he refuses to act on it at his peril, and if he does so he may be called to account by the Lord Advocate,—he may be prosecuted criminally for it. For, (1.) that is the mode in which a subject in this country is entitled to have the aid of the law, and, (2.) because that signed information on which the procurator-fiscal acts is his protection. But is the procurator-fiscal's office like the lion's mouth at Venice, into which any man may toss information, but for which no one is responsible,—responsible, it may be, for a charge made maliciously and without probable cause, and for the purpose of ruining a person in fortune, and leaving an irretrievable stigma upon him, although he never should be tried. I do not know that there was ever any doubt on this subject. No doubt there are cases in which public policy requires that the information given to the Crown shall not be given up, as in cases of treason, and cases connected with the excise. But in this case the Lord Advocate has admitted that no injury would accrue to the public service by the production of this information. I reserve my opinion whether the statement of the Lord Advocate, that it would be injurious to the public service, would be a sufficient answer to us, in cases of ordinary crime, to refuse access to the information in an application such as the present. We will not decide that till the cases arise. If a party accuses *bona fide*, and on grounds which afford sufficient ground for supposing that the crime has been committed against him, he does not require protection. Having the informa-

Jan. 22. 1853. *Robertson v. Henderson.* tion before him, that is the protection of the procurator-fiscal, but if withheld when demanded in a case of this sort, it would be a great injustice to the party.

LORD COCKBURN. I am of the same opinion. There cannot be any doubt on the mind of any man who knows what the duty of the Lord Advocate is. There is a great public policy in protecting the Lord Advocate in his office, which is one of the most important offices in any civilized country, and in this respect Scotland has given to the rest of the world an example which might well be followed, of a public prosecutor with proper powers and under proper restrictions. But if the public prosecutor shall come forward and say that there are certain reasons for making it unsafe to produce his information, whether by simply saying so, he is entitled to shut the door against the party demanding it, I am not prepared at present to say. But here the prosecutor states no objection. According to the view of the defender any man may bring any charge against another provided he makes it at the proper quarter. Keep clear of malice and within the range of probable cause, and the party making the information will enjoy every protection.

LORDS MURRAY and WOOD concurred.

The COURT, "on the report of Lord Rutherford, in the circumstances of the case, as stated in the record, in which the pursuer complains that an information or charge for an ordinary offence, viz., perjury, was presented against him to the procurator-fiscal by the defender, maliciously, and without any probable cause, or any ground of justification whatever: Remit to the Lord Ordinary to grant warrant for the recovery of the said information so presented to the procurator-fiscal, and in respect that the Lord Ordinary has reported that the Lord Advocate has not stated, and indeed declined to state that any prejudice could arise to the public service from the disclosure of the said information, the Lords find it unnecessary to give any opinion on the point whether any statement that such disclosure will prejudice the public service, will be sufficient to protect the informant in the case of an ordinary crime, when such information is said to have been made maliciously, and without probable cause."

Gibson-Craig, Dalziel, and Brodie, W.S., Advocator's and Defender's Agents.

Lockhart, Morton, Whitehead, & Greig, W.S., Respondent's & Pursuer's Agents.

(J. S. M.)

No. 91. **THE MAGISTRATES AND TOWN-COUNCIL OF GREENOCK,**
PETITIONERS.

Burgh—Interim-managers—Challenge of election of Council and Magistrates.—Question of the competency of a petition for the appointment of managers, pending a process of reduction of the election of council and magistrates of a burgh:—*Opinion*, that the acts of the council and magistrates, *bona fide* in possession, during such challenge, were valid, whatever might be the ultimate result.

1st Division. *Jan. 25. 1853.* *Magistrates &c. of Greenock, Petition.* This was a petition by John Martin, provost of Greenock, and the whole of the present magistrates and town-council, proceeding upon the following narrative; that a summons had been served upon them at the instance of John Macgregor Stewart, merchant in Greenock, and designing himself as a qualified voter in that burgh, concluding that the election of Mr Martin, as one of the town-council, and as provost, should be reduced, on the following ground:—that the provost of Greenock having died in March 1852, and the

remaining members of council having elected Mr Martin as interim provost, ^{Jan. 25. 1855.} under the provisions of the Act 3 and 4 Vict., c. 77, sec. 11, (Act regulating the election of magistrates and councillors for certain burghs, not being royal burghs,) he had, on the day preceding the 2d Tuesday of November last, (the latter being the statutory day for the annual election of councillors), granted commissions to certain persons, as his substitutes, to preside, and to others to act as poll-clerks, at the election which was to take place the following day. That he was disqualified from presiding himself, or by substitutes, for two reasons; 1st, In respect, that he ceased to be interim provost on the very day of the election, according to the 23d section of the Act above mentioned, which provides, that any councillor or office-bearer, elected *ad interim*, as he had been, shall go out of office on the 1st Tuesday of November after his election; and, 2d, In respect, that he ceased to be a councillor on that day, according to the 11th section of the Act, by which one-third part of the council shall go out of office at each annual election, and he formed one of the third part whose turn it then was to go out. That at the election thus irregularly conducted, Mr Martin himself was again elected a councillor, and shortly after, at a meeting of the town-council, was elected provost.

The petition then stated, that in consequence of the said action of reduction, they had taken advice as to the validity of the election of 2d November last, and that they had been advised, that, looking to the judgment in the case of *Whyte v. Scott, &c.*, 26th November 1851, there was reason to fear that not only the election of Mr Martin, but of all the other councillors elected that day, might be held invalid, and that probably the burgh might be held to be on that account disfranchised. That if it were so, there were now no parties legally entitled to carry into execution the Greenock Police Act, or the Act of 5 Vict., c. 54, by which the magistrates and whole councillors of Greenock were appointed trustees for maintaining the harbour of that town, or to perform many other important functions connected with public trusts and charities, and involving the daily receiving and paying out of large sums of money.

They therefore prayed the Court to appoint them managers for conducting the affairs of the town, and of the various trusts and charities connected with it, until another town-council and office-bearers should be duly elected, and also for interim appointment during the period of intimation, (if such intimation should be thought necessary,) of this petition.

In support of the prayer of the petition, they relied upon the 25th section of the above named Act of 3 and 4 Will. IV., c. 77, by which, in the event of a burgh being, "in consequence of the decision of a court of law, or otherwise, without any legal council or magistracy, all the functions directed by this Act to be performed by the existing magistrates or town-councils, shall be performed by one or more of the managers, who may, by any lawful appointment, be then in the actual administration of the affairs of any such burgh or town."

At the first calling, *Deas*, and *E. F. Maitland* appeared for the petitioners, and some discussion took place as to the competency of the application while the challenge of the election was still pending, and the case was continued for further consideration.

Jan. 25. 1853.

Magistrates
 Soc. of Green-
 uck. Petition.

At the next calling, *Neaves*, for the pursuer in the reduction, moved to be allowed to lodge answers to the petition, and that for this purpose the case be delayed for a week.

Deas, for the petitioners, said, that if the Court would indicate an opinion hostile to the competency of the petition, he was prepared to withdraw it, and that another would be presented in a manner less open to objection.

The COURT, generally, were understood to indicate considerable doubt as to the competency of the petition. The Lord President remarked, that, but for the case of *Banff* in 1838, he should have little difficulty in holding it incompetent. Lord Ivory said; for my part, I have no hesitation in saying, that my doubts are not removed by the discussion at the last calling. I am not satisfied with the precedent of the *Banff* case. But is there any greater difficulty in the petitioners continuing to act, pending the challenge, than that which must have occurred in innumerable other cases in which there have been complaints tending to annul the whole election? In the case of *Edinburgh*, (6th Jan. 1818), the whole functions of the magistrates, judicial and administrative, were carried on, not only in the face of a challenge, which lasted several years, but, if my recollection does not err, after a first judgment had been pronounced, setting aside the election, and the question was kept open only by a reclaiming petition. The case of the town of *Haddington*, (*Muirhead*, 30th June 1748, M. 2505), is also instructive. For there the rights of a council, *bona fide* in possession, though their election was ultimately set aside, were supported so very far, that the accounts incurred by them while *de facto* in office, in unsuccessfully defending the election, were sustained against the corporation, at the instance of their agent, after they themselves were ousted. On looking at the familiar authorities of *Wight* and of *Bell*, I find no allusion whatever to managers except in the case of actual vacancy.

The petition was then withdrawn.

Duncan and Dewar, W.S., Agents for the Petitioners.

J. Peddie, W.S., Agent for the Pursuers in the Reduction. (W. H. T.)

No. 92.

PHILLIPS v. THOMSON.

Failure of Trustees—Offer to assume—Bankruptcy—Curator and Minor—Judicial Factor.

1st Division.

Jan. 26. 1853.

Phillips v.
 Thomson.

Mr Peter Phillips, on behalf of himself and his two minor brothers, presented a petition, setting forth, that all the trustees under the marriage contract of their father and mother were dead, except Mr William Thomson, writer in *Dumfries*; that his estates had been sequestrated, and therefore craving that, as Mr Thomson refused to denude, he ought to be decerned to do so, and a judicial factor appointed over the heritable subjects embraced in the trust, in which the petitioners were equally interested, as beneficiaries under their parents' settlement.

Answers were given in for Thomson, in which he stated, that besides being the only trustee in life under the trust of the late Mr and Mrs Phillips, he was tutor and curator to the minor petitioners, in virtue of their father's nomination, in the same deed; he admitted that he was under sequestration, and

stated, that personally, he was not unwilling to be relieved of the offices of trustee, and tutor and curator, if the Court should think it proper, in the circumstances, to appoint a judicial factor, and would also relieve him of the office of tutor and curator; that the trust-deed conferred power on him to assume additional trustees, and he added, that he was willing to assume the party proposed by the petitioners, and any other equally unexceptionable individual who may be proposed. Jan. 26. 1853.
Phillips v.
Thomson.

At the advising, *Deas*, for the respondent, offered to assume any two respectable individuals in whom the petitioners might have confidence.

LORD PRESIDENT. In the circumstances occurring here, it appears to me that the offer of the respondent is fair and reasonable. Had the trust-deed contained no power of assumption, or had the respondent, bankrupt as he is, refused to exercise the power of assuming, the case would have been very different. But the property will be quite safe, and under the control of trustees, in whom the petitioners have confidence, and seeing that the respondent was named tutor and curator by the late father of the petitioners, the Court, in the position of matters here, will pause before removing him merely because he is bankrupt.

The other Judges concurred, and the petition was suspended that a proper deed of assumption might be executed.

Shand, for the petitioners.

Campbell and Neil, W.S., Agents for Petitioners.

Duncan and Dewar, W.S., Agents for Respondent.

JAMIESON v. CAMPBELL.

No. 93.

11 and 12 Vict. c. 36, § 43 — *Entail Amendment Act—Construction.*—Where the irritant and resolute clauses in an entail formed one continuous sentence, the whole must be considered together in judging of its full legal import. Circumstances in which the irritancy held good in such a sentence.

This was an action of declarator and adjudication against Admiral Campbell of Barbeck, and others, concluding to have it found and declared that the deed of entail of the lands of Barbeck does not contain any clause effectually irritating deeds of alteration of the order of succession contained in the said deed of entail, and, consequently, that the said entail is invalid and ineffectual as regards all the prohibitions therein contained, and that the said lands and estates of Barbeck, &c., are subject to the deeds and debts of the heir of entail in possession, and of his successors. 2d Division.
Jan. 26. 1853.
Jamieson v.
Campbell.

Defences were lodged by Admiral Campbell and the heirs-substitutes of entail: and a record having been made up, the Lord Ordinary, (Rutherford,) "Finds that the entail mentioned in the libel is valid and effectual in regard to the three leading prohibitions against alienation and contraction of debt, and alteration of the order of succession, and does not therefore fall under the provisions of § 43 of the 11 and 12 Vict., c. 46: Finds, therefore, that the lands are not adjudgable as held in fee-simple for the debts of the heir in possession: sustains the defences: assoilzies the defenders: and decerns: Finds the pursuer liable to expenses, &c."

To the interlocutor, his Lordship added a note, which contains the clauses

Jan. 26. 1858 in the entail in question, and deals with the arguments maintained by the pursuer in support of the action, and which is, therefore, here given at length :
 Jamieson v. Campbell. —“ Cases of the same class with the present have of late been so often under the consideration of the Court, that the Lord Ordinary conceives it would be idle to enter into any discussion respecting the canons of construction applicable to such instruments. The recent cases in the House of Lords have modified, or, at least, differently expressed the rule laid down by Lord Corehouse in the case of *Speid v. Speid*, 21st February 1837, and it would now seem to be the rule, that although, where there is ambiguity, the construction shall be for freedom, and against fetters, yet the ambiguity must be found, not in a forced or constrained construction, but giving to the words used their natural and grammatical meaning. Farther, it is a sound principle as laid down by Lord Moncreiff in the case of *Murray*, House of Lords, 3d May 1849, with the approbation of the Court and of the House of Lords, that where a passage consists of one continuous and unbroken sentence, combining the irritant and resolute clauses, the whole must be considered together in judging of its full legal import. Without going farther into general discussion, look to the clauses of the entail in question. The prohibitory clause it is unnecessary to refer to particularly. Like all the other clauses in this deed, it is very full and anxious. It may just be observed in passing, that the separate prohibition against altering the order of succession is very fully expressed, declaring that it should not be lawful, not only to alter the order of succession, but also to do or commit any act or deed either civil, or criminal, or even treasonable, which may import, even indirectly, change of the order of succession. In the same manner, after prohibiting various other acts and deeds, and among the rest sales or alienations, the prohibitory clause closes with another general prohibition, “neither shall it be lawful to, nor in the power of, the heirs male of my body,” &c., “to do or commit any act or deed either civil or criminal, or even treasonable, by which the said lands, teinds, and others, or any part thereof may be adjudged, apprised, evicted, or become caducuary, escheat, or confiscated in any sort.”

The entailor then proceeds in one sentence—though a long one, and framed upon the principle of enumeration—to give the irritant and resolute clauses, “And it is hereby expressly provided and declared, that if the heirs male of my body,” &c., “shall omit to use and constantly bear the surname,” &c., “or shall possess the said lands,” &c., “under any other title than the present tailzie,” &c., “or shall omit to insert,” &c., “or shall alter the order of succession, or commit any act or deed, civil, or criminal, or treasonable, by which the said lands and estate may be confiscated or escheat, or the conditions hereof, or order of succession hereby prescribed, innovated, or changed, or shall allow the said lands and estate to be in non-entry,” &c., “or shall fail to purge or redeem the said adjudications,” &c., “or shall sell, wadset, or impignorate the said lands and estate, or any part thereof, or burden the same with debts, or grant tacks or rentals thereof, or do any other act or deed, civil, criminal, or treasonable, in the contrary of all or any one of the conditions herein before expressed, then, and in that case, all and every one of such sales, alienations, debts, acts, and deeds, with all following,” &c., “shall be, *ipso facto*, void and null,” &c., “in the same manner as the said sales and aliena-

tions had never been made, or as if the debts, acts, and deeds had not been Jan. 26. 1853.
contracted, done, acted, or committed, and the person so contravening, either
by acting contrary to the prohibitions of this tailzie, or by omitting to fulfil ^{Jamieson v.}
the conditions thereof, shall, for himself alone, immediately upon the contra- ^{Campbell.}
vention, lose and forfeit," &c.

"The whole of this sentence must be read together. It begins by putting in hypothesis under the words "if the heirs shall," &c., every act of omission or commission which forms the subject of the prohibitory clause. This hypothetical enumeration was admitted to be, and is obviously complete.

"Having thus stated every possible infringement of the prohibitions, he proceeds, "then, and in that case,"—these words are of great importance, as occurring at the very outset of what has been termed the operative part of the irritant clause. They cannot be held to mean in the *last*-mentioned case only. That would be a very violent construction, contrary to all that has been recently settled in the matter. It would make nonsense of the whole clause and be inconsistent even with the reading on which the pursuer mainly relies. The Lord Ordinary did not understand that he contended for such construction. The words "then, and in that case," according to their plain, natural, and, looking to the context, only grammatical construction, refer to each infringement of the prohibitory clause put in the hypothesis. They mean, and can only mean, what might have been more fully expressed by "then in all, or any, or each of these cases."

"If such then be the introduction, what are voided and annulled are, all such sales, alienations, debts, acts, and deeds. That is to say, all sales, alienations, debts, acts, and deeds, made, contracted, done, acted, or committed, in all or any, or each of the supposed cases of infringement which exhausted the whole prohibitory clause. The resolute clause continuing the sentence is plainly confirmatory of this construction, "and the person so contravening," that is, contravening in each supposed case of infringement, either by acting contrary to the prohibitions, &c., or omitting to fulfil the conditions, &c., "shall forfeit, &c."

"The ingenious argument made for the pursuer, resolved mainly into two points:—*first*, that the words "all and every one of such sales, alienations, debts, acts, and deeds," being qualified by the relative "*such*," found a sufficient antecedent by going no farther back than the words "or shall sell," and the following part of the hypothetical portion of the combined clauses: And the cases of *Lang and Others*, were referred to as justifying an application so restricted of the relative "*such*." The Lord Ordinary cannot assent at all to this view, which overlooks not only the natural, but the grammatical force of the words "then, and in that case;" for a use so restricted of the relative "*such*," cannot in this instance be maintained, without disallowing and making absolutely idle, all the previously enumerated acts of possible infringement, including the acts and deeds by which directly or indirectly the order of succession might be altered.

"The other point mainly pressed by the pursuer, resting upon the cases of *Tillicoultry and Ballileask*, was, that the irritant clause was defective in enumeration; not as in the last of these cases by omitting any of the prohibitions in enumerating the assumed cases of infringement, for that enumeration is

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complete; but in what was termed the operative parts of the clause, namely, where it voids "sales, alienations, debts, acts, and deeds." That raises the question whether "sales, alienations, and debts," being specifically mentioned, will in a clause so constructed as the present, interrupt the operation of the terms "acts and deeds" qualified as done, acted, or committed, and limit it only to those which, in the hypothetical part of the clause, are mentioned subsequent to sales, alienations, and debts. The Lord Ordinary thinks this would be overstraining the principle which ruled the decision of the cases referred to. And one plain answer is again found in the qualification of the relative "*such*," by the words "*then, and in that case*," so as to throw it directly back upon all the acts and deeds. There is no ambiguity here arising from two different readings, both natural and according to the ordinary and grammatical use of the language. The pursuer's contention at the best, and the Lord Ordinary does not think even that well founded, is, that by a constrained construction, the clause might be limited in its operation.

"The Lord Ordinary would observe farther, that care must be taken in applying the case of *Tillicoultry*, because it may well be contended, that where an entail does not keep to the very general words "acts and deeds," but introduces the term "debts," he was proceeding upon the principle of *enumeration*, restricting, therefore, the meaning of the words "acts and deeds," and rendering the irritant clause inapplicable to sales and alienations. Yet in the case of *Cockspow*, *Murray v. Murray*, House of Lords, 4th September 1844, in which the clause was sustained as effectual against sales, what was annulled, was, all and every of the said "debts, deeds, crimes, and delicts," but the special enumeration of "debts, crimes, and delicts" was not held to restrict the effect of the general term "deeds," or render it not applicable to sales; and in the same manner in the case of *Ranniestoun*, *Dingwall v. Dingwall*, House of Lords, 17th April 1845, the entail irritating "debts, deeds, and acts," "and resolving the right of the heir and disburdening the estate of debts and deeds, and acts, and crimes," the terms were held sufficiently broad to cover all the prohibitions, and the specification of "debts," did not affect the special application of the more general terms. In the same manner in the case of *Finzean*, *Farquharson*, House of Lords, 5th September 1844, the words in the irritant clause were "debts, acts, and deeds," and so in many others that might be mentioned.

"The Lord Ordinary is quite aware, and it has often been said by high authority, that except as furnishing general rules of construction, or unless where the terms of the entail are quite identical, little is to be learned by referring to precedents. He abstains therefore from doing so. The grounds upon which he gives his judgment will be sufficiently clear from the preceding note."

Against the interlocutor, the pursuer reclaimed.

Patton and *G. G. Bell*, for the reclaimers.

Ross and *Moir*, for the respondents.

THE LORD JUSTICE-CLERK. I am so entirely satisfied with this interlocutor, that I have nothing to add in addition to what the Lord Ordinary has stated in his note. I concur with every observation in the note. I only wish to

add this, that I am inclined to carry the principle in the case of *Murray* a little farther than is laid down by Lord Moncreiff. If the irritant and resolute clauses and the prohibitory clause are all portion of the same continuous sentence, then I concur with Lord Moncreiff in thinking that you cannot get at the proper construction without you take the whole together. I consider that the former part of the sentence must be taken into account along with the latter; and if there be doubt as to the former, that doubt will be resolved by what follows. I think, therefore, that where it forms one sentence you must take the whole together.

LORDS COCKBURN, MURRAY, and WOOD concurred.

The COURT therefore "refuse the said reclaiming note, and adhere to the interlocutor reclaimed against. Find the claimer entitled to additional expenses," &c.

James S. Tytler, W.S., Reclaimer's Agent.

Graham and Webster, W.S., Agents for Admiral Campbell.

Menzies and Maconochie, W.S., Agents for Colin Yorke Campbell, Esq., R.N.
(J. S. M.)

MULTIPLEPOINDING, ANDERSON v. SHIRREFF, ROBSON, AND OTHERS.

No. 94.

Vesting—Trust-Deed—Construction of.—Provisions of a trust-deed, in construing which, vesting of the fee of the estate was held to have taken place in the children of the truster, in respect of the terms of the leading purpose of the deed, notwithstanding an apparent inconsistency with this in the terms of its subordinate parts.

This was a multiplepoinding raised by Anderson, judicial factor, appointed 2d Division, on failure of the trustees, upon the trust-estate of the late Mrs Margaret Gillespie or Shirreff.

The testator, who was a married woman, possessed of separate estate, died in 1819, leaving a trust-disposition and settlement, whereby she conveyed her whole estate, heritable and moveable, (reserving her own liferent), to certain trustees for the following purposes: 1st, Payment of debts, &c.; 2d, "To hold the residue of my means and estate in trust, for behoof of the said Robert Shirreff," (her husband), "in liferent, under the conditions after specified; and for behoof of Margaret Shirreff, my only child, and any other child I may hereafter have, in such proportions as I may appoint by a writing under my hand, which failing, equally among them." The liferent to the husband was then declared to be alimentary, and the trustees were empowered, should he marry again, after her decease, or after any of her children should attain the age of twenty-five, or be married, "to withdraw from the liferent of the said Robert Shirreff, a sum not exceeding £2000 in whole, and pay the same to such child or children, or apply the same for her or their behoof; " 3d, And failing heirs of my body, I hereby authorise and appoint my said trustees, and their fofoes, to pay the following sums to the persons following, at the first term of Whitsunday or Martinmas after my decease, or after such failure, whichever of these events shall last happen, viz., to the said Robert Shirreff, the sum of £1500 sterling." Then follow certain other legacies, and that failing any of the legatees before the term of payment, the legacies are to be paid to their heirs. "Lastly," "I hereby authorise and appoint my

Jan. 26. 1853. said trustees and their foresaids, at the first term of Whitsunday or Martinmas after the death of the longest liver of me and the said Robert Shirreff, (by whom the residue of the estate is to be liferented), or at the first of these terms after the failure of heirs of my body, whichever of these events shall last happen, to divide the rent, residue, and remainder of my said subjects and estate, between the said Ann Gillespie, and Mary Gillespie, my youngest sister, equally between them," &c.

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The testator was survived by her daughter Margaret, by a son, Robert Shirreff, junior, born after the date of the deed, and by her husband.

Margaret Shirreff, the daughter, died in 1827, leaving a deed of testament, executed with consent of her mother's trustees. Robert Shirreff, junior, the son, also died in 1847, leaving a trust-disposition and settlement, by which he conveyed all his interest in the residuary estate of his mother. The husband has entered into a second marriage.

In March 1849, an action of count, reckoning, and payment was raised by the husband, Robert Shirreff, senior, against Anderson, the judicial factor, concluding for payment of certain arrears of liferent, said to be due to him, and also for the legacy of £1500, left to him by his wife.

Upon this action being instituted, Anderson raised the present action of multiplepounding, and the two actions were conjoined.

In the multiplepounding, the following parties appeared. 1st, Robert Shirreff, the testator's husband, who claimed his arrears and legacy as above mentioned; 2d, George Robson, judicial factor on the estate of the deceased Robert Shirreff, junior, (the trustees originally appointed having failed,) who claimed the whole of the residue of the trust-estate, in respect that it had vested equally between the said Robert Shirreff, junior, and his sister Margaret, *a morte testatoris*, and that on the death of Margaret, her half had then also vested in her brother, as next of kin, and that the whole had been effectually conveyed by his trust-disposition; 3d, Mrs Greig and husband, and Mrs M'Dougal, who claimed as legatees under the will of the deceased Miss Margaret Sheriff, the testator's daughter; 4th, Allan Gilmour, who claimed as an assignee of Robert Shirreff, the husband.

The Lord Ordinary (Cowan), pronounced an interlocutor, preferring "in terms of their respective claims, Robert Shirreff, the husband, and Allan Gilmour, claiming in his right, for the sum of £1500, bequeathed to the said Robert Shirreff, by the trust-disposition of Mrs Margaret Gillespie or Shirreff." "But reserving for future consideration any question competently raised between the said parties and the raiser;" and repelling the claims of the competing claimants, as in competition with the said Robert Shirreff and Gilmour.

His Lordship, in his note, observed, that he did not consider the fee of any portion of the estate as having vested in the children during the subsistence of the liferent, and that in his opinion, the legacies bequeathed in the third purpose of the deed, were to be viewed as intended to take effect on failure of heirs of the testator's body, either prior to her own death, or after that event, or at any time prior, at all events, to the death of the liferenter.

The claimants, other than Robert Shirreff, senior, and his riding claimant, Gilmour, reclaimed.

For whom appeared *H. J. Robertson*, who argued in favour of vesting *a morte* Jan. 26. 1858.
testatoris.

G. Young, for the claimants, Shirreff and Gilmour, supported the judgment of the Lord Ordinary, that vesting could not be held to have taken place *a morte*; founding his argument mainly on the words, "or after such failure," &c., in the third and last purpose of the deed. At all events, if it had, it must be only *quoad* the residue of the property, after deducting the portion which it was in the power of the trustees to withdraw or not, and more particularly the legacies provided for in the third purpose.

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The LORD JUSTICE-CLERK. I have stated in the case of *Richardson v. Robertson*, 1843, very strongly the importance due to clear manifestations of the intention of the truster in interpreting a trust-deed, provided that the machinery of the deed does not render the fulfillment of that intention impossible. Care must be taken not to give undue weight to doubtful inferences drawn from the secondary parts of the deed, in opposition to what is expressed in the leading part of it, in clear and technical words, the import of which has been long settled. I think the present case is one in which this broad view of the deed gives a clear result, and excludes all pleas founded on particular expressions in its secondary parts, which may suggest contradictory inferences.

It is a testamentary deed by a lady having one child, and expecting more. She conveys her separate means to trustees, for the payment of debts and expenses of collection, and then, as to her whole free estate, the great leading purpose of the deed is; [His Lordship here read the first part of the second purpose.] The whole estate is thus placed in the hands of trustees, to be held in liferent for the husband, and in fee for the children. Unless there is some explicit declaration that the estate does not vest *a morte testatoris*, or other exclusion of vesting, it would be a contradiction to the settled construction of such terms, to hold that it did not so vest. The main object of the trust is the protection of the liferent, and the separation of it from the fee. The fee is given to the children, and only held by the trustees for them, and the moment the deed takes effect by the granter's death, the fee is by the deed granted and settled in the children, the trustees being merely holders of it. It is conveyed to the children, though the *title* is given to others for their behoof. The primary objects of the trust are thus the husband and children; and so plain and simple a purpose being provided for in clear terms, it seems to be most unsafe to limit, or rather alter it, by inferences of intention, founded on an accidental, and perhaps unintended expression in a secondary part of the deed, or, indeed, by anything short of a declaration expressly controlling the principal clause, and declaring that the ordinary result in law should not follow. The question however raised by the principal clause, is scarcely one of vesting. The fee is given to the children, though to be held by trustees.

The remainder of the clause authorises the trustees to withdraw a portion of the funds from the liferent, and apply it directly for behoof of the children. That certainly does not take away from the force of the previous clause. But it is said that if the trustees have power thus to withhold a portion of the funds, they may also limit the children's right in the same to a liferent, and hold for the grandchildren in fee. But the clause in question only shews

Jan. 26. 1853. *Anderson v. Shirreff, &c.* that the truster knew what she was doing, and that when she meant to limit the fee conveyed, she did so in express terms, and that all which was not so limited, was conveyed to the children directly. But the *third* is thought to control the general purpose of the leading clause. It has been separated from the fourth, but we cannot consider the effect of the one, without looking also to the other, and to the whole deed, according to a canon of universal application. In the ordinary case when trustees are directed to hold for behoof of children in fee, and another purpose is then introduced by the words, "and failing heirs of my body," the failure is held to apply to failure at the death of the truster. This principle solves a great many cases. Here, the third and last clauses are plainly introduced to meet the case of the children predeceasing the truster. The third and fourth purposes constitute together one general alternative direction for the event of the truster leaving no children. The expression in these third and fourth clauses, "or to which of these events shall happen last," seems superfluous and inadvertent. In the fourth, it is nonsense. In the third, I regard it as a phrase borrowed from some style, without reference to its being inapplicable to the object of the clause. To construe "failing the heirs of my body" in the third purpose as meaning anything but failure "at my death," would lead to the monstrous result, that the trustees must hold for ever, or at least as long as any heirs of the body remained, besides being incompatible with the direct terms of the primary and regulating purpose of the deed.

LORD COCKBURN. I am of opinion that the general estate vested in the two children from the death of the testator. If it did not vest then, I do not see how it could ever be vested in them at all. But vesting does not seem to me to decide the present question. Although the general estate was given to the two children, and was vested in them, they could only take it *subject to its burdens*. They were bound to fulfil all the obligations of the deceased. Funeral charges, debts, husband's lierent, all formed deductions from the estate. If this legacy of £1500 was due, they could not escape from the obligation to pay it, whatever will they might choose to make. Accordingly they don't attempt to do so, for they dispose only of their "interest in the residuary estate." The real question therefore, is, whether this legacy is due. The words are "in the third place, and failing heirs of my body," &c; the trustees are to pay this legacy, amongst others, "at the first term of Martinmas or Whitsunday, after my decease, whichever of these events shall last happen." It is plain from these expressions, that she contemplated two modes of "failure" of heirs of her body; the one before, and the other after her own death. Her meaning therefore, was, (or at least the only meaning deducible from the deed), that the legacies were to be paid neither during her life, nor those of her children, but at the last death of the three. This happened on the death of her son in 1847, which produced her contemplated "failure of heirs of her body." It is immaterial that this tends to prolong the trust. I therefore concur with Lord Cowan in holding this legacy to be due.

LORD MURRAY. This is a case of great difficulty. The view of Lord Cockburn is very simple, and very clear. It may be possible that that was the view held by the testator; but I think that she has not expressed it in satisfactory and effectual terms. And unless the intention is made clear

beyond dispute, the only safe course is to decide upon general rules of law. Jan. 26. 1853.
I therefore concur with the Lord Justice-Clerk."

LORD WOOD was of opinion, that, while the second purpose made one full and complete settlement and distribution of the whole trust-estate, the testator meaning to embody in it her entire testamentary will, in relation to the event thus provided for, of her being survived by children,—the third and fourth purposes related solely to the contingency of the truster's children predeceasing her. Some words in the third and last purposes had no doubt been founded on as a farther declaration of the testator's will, to operate even in the event of survivance of heirs of her body; but in the face of the direct and exhaustive settlement under the second purpose, by which there was a direct giving of the fee to the children, it would require that indications of an opposite intention should be very significant and clear, before they could be received as qualifying or limiting it, which was certainly not the case here. "The provisions in the third, and in the last purpose, therefore, appear to me to contain a new and separate distribution of the estate in an opposite event from that provided for in the second; but should this view not be adopted, I think the only other admissible alternative is, that the third and fourth purposes, in so far as applicable to the event of children surviving the testator, and afterwards failing, import a *defeasible substitution*; in which case the fee vests, and the substitution has operation, only if not worked off, or evacuated either by payment, or an equivalent, or by any deed executed by them, disposing of the fee, whether they shall have outlived or predeceased her. These alternatives equally exclude the claim of Robert Shirreff,—the first, even if they had executed no deed; the second, by the deeds which they did execute.

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The Court "alter the interlocutor reclaimed against; repel the claims of Robert Shirreff and Allan Gilmour, respectively, claiming the sum of £1500; Find that according to the true meaning of Mrs Shirreff's trust-settlement, the fee of the residue of the said Mrs Margaret Gillespie or Shirreff's trust-estate vested on her death in Robert Shirreff, junior, and Miss Margaret Shirreff, her son and daughter, equally between them; Find that the power conferred by Mrs Shirreff on her trustees, to withdraw from the residue of the liferent of Mrs Shirreff, a sum of £2000, was not validly and effectually exercised by them, in so far as related to Miss Margaret Shirreff's portion thereof; therefore sustain the claim of the said George Robson, judicial factor on the estate of the said Robert Shirreff, junior, who had succeeded to the right and interest of his sister, the said Miss Margaret Shirreff, in the said estate of fee, in so far as not disposed of by her settlement, and rank and prefer the said George Robson accordingly, and decern; and also sustain the claim of Mrs Margaret Gillespie or Greig, and Mrs Barbara Gillespie or Macdougall, and the said David Greig for his interest, and rank and prefer them accordingly; Find no expenses due to either party in this discussion, *quoad ultra* remit to the Lord Ordinary to proceed farther in the cause as he shall see fit."

W. A. G. and R. Ellis, W.S., Agents for Reclaimer.

P. Graham, W.S., Agent for Respondents.

(W. H. T.)

ACT OF SEDERUNT.

1st Division. The Court intimated that an Act of Sederunt had been passed, to the
 Jan. 27. 1853. following effect:—That owing to the great number of cases at present on the roll of the First Division, and the great number which would remain on the roll at the termination of the winter session on the 11th of March next, it had been determined, under the power contained in the Act 2d and 3d Vict. c. 36, sec. 10, that the winter session should extend to the 1st day of April next, inclusive, with power, during the extended period, to sit also on Mondays.

That the said extension being for the purpose of disposing of causes on the long roll, it should have no effect in regard to petitions or incidental applications, or appeals from Inferior Courts, or in regard to the currency of reclaiming days, or in regard to the powers and duties of the Lords Ordinary on the bills, or the procedure connected with the Bill Chamber, or any matters whatever, except causes on the long roll of the First Division on the 11th March.

The Dean of Faculty and the Deputy-Keeper of the Signet attended to hear the intimation.

No. 95.

HOGGS v. HOGG.

Process—Averments, relevancy and sufficiency of—Marriage, Declarator of.—In a declarator of marriage, the pursuer in her record, stated merely that she and the defender had been married in London by a clergyman whom she named, but did not otherwise designate, nor did she state the church, or place, or the exact time of the marriage. Action dismissed on the ground of irrelevancy and insufficiency of averments.

1st Division. This was a declarator of marriage at the instance of one of the pursuers,
 Jan. 27. 1853. and of legitimacy at the instance of the others, her children, against the defender.

Hoggs v. Hogg. In the record it was averred that the defender and the female pursuer, the former being a domiciled Englishwoman, and the latter resident at the time and engaged in business in England, had been married "in London" "by the Rev. David Robertson," but it was not stated *when*, or *in what church*, nor was the clergyman designated as belonging to any particular sect, or where he was incumbent. The record was closed as between the female pursuer and the defender.

The Lord Ordinary (Robertson) "sustained the defences, and assoilzied the defender from the conclusions of the libel," in respect that there were "no circumstances averred sufficient to constitute a marriage in England or Scotland."

The pursuers reclaimed, for whom appeared *Maidment*. For the defender, *P. Fraser*, and *Deas*.

The COURT agreed with the Lord Ordinary in holding that there were no sufficient or relevant statements in the record, but observed that instead of assoilzieing the defender, the interlocutor ought to have been one dismissing the action.

"Alter the Lord Ordinary's interlocutor submitted to review, in so far as Jan. 27. 1853. it sustains the defences, and assoilzies the defender. Dismiss the action so far as regards the pursuer, Ann Maria Shade or Hogg;" and in respect of there ^{Hoggs v.} ~~Hogg.~~ being no record made up with the other pursuers: Remit to the Lord Ordinary to proceed farther in the cause as regards them, &c."

Richard Arthur, S.S.C., Pursuers' Agent.

Jardine, Stodart, and Fraser, W.S., Defender's Agents.

(W. H. T.)

BRITISH LINEN COMPANY'S BANK v. THOMSON.

No. 96.

Cautionary obligation—Discharge of Co-cautioner—Proof—Bank books.—1st, A. and B. granted a bill, which was deposited with a bank in security of such advances as might be made to C. during its currency. The bank, during its currency, discharged B.:—*Held* that this discharge liberated A. from his entire liability. 2d, Two books of a bank, one containing deposits by, and the other advances to an employer, held not to be sufficient evidence *per se* of a balance said to be due by him to the bank.

The defender Thomson, in November 1843, accepted, along with two other ^{1st Division.} parties, a bill for £1500, payable eighteen months after date, for the accommo- Jan. 27. 1853. dation of Durie, a corn merchant in Arbroath, by whom it was indorsed and deposited with the British Linen Company in security of advances, past and ^{Brit. Lin. Co.} ~~v. Thomson.~~ future.

In December 1844 Durie absconded, leaving, it was alleged, a balance due to the bank, and in May 1845, the bill having fallen due, the three co-acceptors were charged, and raised suspensions. The bank also raised an ordinary action to constitute against them the balance due by Durie, and the actions were conjoined.

The case as it now came before the Court, referred solely to the question as between the bank and Thomson; one of the other defenders, Milne, having been assoilzied of consent, on the ground of his alleged signature on the bill being forged, and the other, Esplin, having been held in a previous branch of the case, (see 6th June 1849, S. and D. and Jurist), to be relieved from the obligation in respect of a general arrangement with his creditors which took place soon after he had accepted the bill, and to which the bank were a party.

The bank now attempted to prove a balance in their favour against Durie of £1899:1:2, for which they maintained that the defender Thomson was liable, to the extent of the accommodation bill, with interest since due. They lodged an account of their advances to Durie, and his deposits with them up to 30th May 1844, bringing out a balance against him at that date of £1634:17:10. This balance was admitted by him in a docquet of that date. They stated that between that time and the date of his flight, in the following December, a number of additional transactions had taken place; and lodged a second account, to which the foresaid balance of £1634 was carried, containing on one side payments by Durie to them during that period, amounting to £7129:10:5, and on the other, advances to him by the bank, bringing out in their favour the balance of £1899:1:2, now claimed. These were not accounts current, but bore to be extracted from separate books. The payments by Durie bore to be extracted from their deposit journal, and the advances to him from their ledger. There were no other

Jan. 27. 1853. vouchers for the latter sums, except the docquet above mentioned, and twenty-five orders for sums amounting to £962 : 17 : 6, with the signatures deleted.
 Brit. Lin. Co. v. Thomson.

They maintained, that while the docquet of 30th May 1844 sufficiently instructed the balance against Durie as at that date, it threw the onus of proving the ultimate extinction of that balance upon the defender. That it had been extinguished for a time by his subsequent deposits, they admitted to be proved by their own deposit journal, but the defender could not found upon this book alone, and if he availed himself of its evidence, he must also admit the counter-evidence of the other books of the bank. These books must be taken as a whole, and could not be approbated and reprobated.

The balance being thus proved, they argued, that the defender, whose name stood on a bill which was admittedly deposited with the bank in security of advances to Durie, without any qualification, must be held liable to the extent of the sum contained in the bill, notwithstanding that one of his co-obligants had been discharged, and the signature of the other had proved a forgery. *Gibson v. Campbell*, 12th November 1753, F. C.; *Gordon v. Sutherland*, 20th January 1761, M. 14,677; *M'Donald v. Stewart*, 5th July 1810; *M'Dougall's Executors*, 13th November 1830; *Bank of Scotland v. Taylor*, 1st July 1836; *Magistrates of Edinburgh v. Gardiner*, 1st August 1766; *M'Gregor v. Gibson*, 19th February 1831; *Taylor on Evidence*, p. 478; *Lockerby v. Stirling*, 25th June 1845.

The defender pleaded, *inter alia*, that the bill libelled was precisely analogous to a cautionary obligation in a cash credit, to be undertaken by three cautioners, as it was taken by the pursuers, not in the course of ordinary business, but as a cautionary obligation. It could not, therefore, afford any ground of action, as it had never been completed by Milne, in reliance on whose joint-obligation the defender agreed to sign it. *Solly v. Forbes*, 2 Brod. and B., pp. 38 and 48; *Paterson v. Bonar*, 9th March 1844, Chitty on Bills, p. 500, (Ed. 1840); *Blair v. Taylor*, 1st July 1836; *Leafe v. Gibbs*, 17th December 1830, Carr. and Payne, iv. 466; *M'Kenzie v. Macartney*, Wilson and Shaw, v., p. 504; *Swan v. Blair*, 25th May 1847.

Also, that the pursuers were not entitled to receive the bill from Durie without apprising the defender of the old balance due upon the account, and that he, (the defender), was not liable for advances made after Durie absconded.

Also, that there was no evidence of the balance now said to be due. After crediting the sum admitted in the docquet of May 1844, and the sums contained in the orders by Durie which had been produced, the deposit journal shewed a large balance in Durie's favour. The books of the bank were evidence against them, but none in their favour. *Catt v. Howard*, 3 Starkie, N. P., pp. 3 and 6; *Sturge v. Buchanan*, Adol. and Ellis, 10, p. 598; *Philip on Evidence*, i., p. 342.

Finally, By their discharge of Esplin, the pursuers had freed the defender from the whole debt, or, at least, from Esplin's share of it, and were farther bound to give credit for the dividend on Durie's estate.

The Lord Ordinary, (Ivory), on 22d Dec. 1849, (*of consent*, and in respect of the decision of the Court in *Esplin's* case, finding that the discharge granted

him included this debt), sustained the reasons of suspension and the defences for Thomson, to the extent of one-half of the contents of the bill sued for, (being *Esplin's* share of the obligation). Jan. 27. 1853.
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v. Thomson.

After written arguments on the remaining part of the case, his Lordship pronounced the following interlocutor :—

“ Finds no sufficient evidence, that on 3d May 1845, when the bill for L.1500, pursued on and charged for against the defender, Charles Thomson, &c., &c., fell due, Charles Durie was to any extent debtor to the pursuer : Further, and *separatim*, Finds, that even had the pursuers been, at said date, creditors of the said Charles Durie, yet, they having, on 15th June 1844, (while the account-current, in respect of which the said bill had been deposited in security, was still going on, and had a considerable time to run), discharged the said Charles Thomson's co-acceptor and co-surety, Esplin, thereby placing the said Thomson, for the whole remaining period, between the said 25th June 1844 and 3d May 1845, in the situation of sole surety for the said Durie, contrary to the faith of the arrangement under which the said deposit in security was made, and the account-current in the name of Durie was to be conducted ; the effect of their so doing was to liberate the said Charles Thomson from all liability in respect of the said bill. Therefore, in the ordinary action, sustains the defences to the above effect, and in respect of either or both of said grounds of defence, assoilzies, &c. In the suspension, suspends the letters *simpliciter*,” &c.

The pursuers reclaimed ; for whom *Macfarlane*, and *Dean of Faculty*, (*Inglis*).
For the defender, *Deas* and *Christison*.

The LORD PRESIDENT. I agree with the Lord Ordinary. The bill libelled on contained a cautionary obligation by the defender, not for the specific amount of the bill, but for any sum which Durie might be due to the pursuers at its maturity. Such balance must be proved and constituted. This has been attempted by the pursuer, but the proof has been most unsatisfactory, as to all transactions subsequent to the docquet of May 1844. I cannot regard the two books founded on as *parts of one account*. There is no evidence how these books were kept ; in particular, the second book, the ledger is not sufficiently supported, and there is no evidence that it was kept at the same time with the other. But I am willing to take the case without the books altogether, either as proving the one side or the other of the account. The defender is entitled to do this, and to maintain that there is a total want of evidence that any balance was due at the termination of the transactions.

As to the second finding of the Lord Ordinary, I hold that by relieving Esplin, they changed the position of the defender, and that they were not entitled to do so. This seems to me to relieve him not only from Esplin's half, but altogether.

LORD FULLERTON. The first finding of the Lord Ordinary is quite conclusive, if well founded. It is, however, founded on a very peculiar view of the principle by which the evidence is to be tried. It is true, that subsequent to the docquet, there is no express acknowledgment by Durie of advances made to him ; and the defender maintains that the books founded on by the bank are not evidence of such advances, and cannot be used as counter-evi-

Jan. 27. 1853. *Brit. Lin. Co. v. Thomson.* dence to the other book, which he has recovered, and on which he founds. Now, the pursuers are a bank, a body dealing in money, by paying it out and receiving payment, as the exigencies of their employers require. The defender and the other cautioners knew the relative situation of the bank, and the principal debtor, when they granted the bill. They must, therefore, have considered the kind of evidence which is uniformly resorted to in determining a balance of this kind. If the whole entries had been thrown out in the form of an account-current, there is no doubt that the defender could not have looked to one side and not at the other. Is there any difference, in respect that these entries have, from the nature of the business, been made in separate books, more especially, since it is the *defender*, not the pursuer, who has recourse to them? I should like to see some authority for holding this. It is not, however, necessary to decide this point; the other ground taken by the Lord Ordinary is quite insurmountable. Here the cautionary obligation was not for a specific sum, but for a series of successive transactions, and while that obligation was still current, one of the parties is discharged, the whole term of the obligation altered, and the defender placed in a position which he never contemplated, and to which he would never have consented. The case is precisely the same in principle as that of *Paterson v. Bonar*.

LORD CUNINGHAME. The law on the second question is so well founded, that it supersedes all other discussion. The pursuers, by discharging Esplin during the currency of the bill, without the consent or knowledge of the defender, instantly put an end to the obligation of the latter. This is according to the latest and best authorities both in England and Scotland. (See Smith on Mercantile Law, p. 257.) On the other point, I at first had some doubts, but I can hardly differ from the Lord Ordinary, so far as to hold that the books of the bank, without any vouchers, are *per se* sufficient evidence.

LORD IVORY stated that he still adhered to his opinion, as embodied in his interlocutor in the Outer House.

The COURT therefore adhered.

Hunter, Blair, and Cowan, W.S., Pursuers' Agents.

Webster and Renny, W.S., Defender's Agents.

(W. H. T.)

No. 97.

FRASER AND OTHERS v. BOYD AND OTHERS.

Bill of Exchange—Onerosity of—Cautionary Obligation—Oath of Reference.—In an action upon a prescribed bill, reference being made to the defender's oath, he deponed that he signed it merely as cautioner for the other obligants, but in renewal of a former bill which he had signed in the same character :—*Held* that the oath was affirmative of the reference, in the question of value received, in respect that, by the renewal, he escaped from the obligation undertaken in the former bill.

1st Division.

Jan. 28. 1853

*Fraser, &c.
v. Boyd, &c.*

This was an action, originally in the Sheriff Court of Renfrewshire, at the instance of Fraser and another, executors of the deceased Patrick M'Lerie, on a promissory note for £83, dated in April 1837, and signed by the defender Boyd, along with two persons of the name of Muir. It was payable four months after date, and bore to be for value received; on the bill was a marking of £30 paid to account. The two Muirs were bankrupt, and Boyd

was thus the only defender. He pleaded no value, in respect that he was merely a cautioner for the Muirs; and that the bill had suffered the sexennial prescription. Jan. 28. 1853.

Fraser, &c.
v. Boyd, &c.

A reference was made to the defender's oath. He deponed that the signature was his, that the promissory-note was the renewal of a former one which he had signed as cautioner for the late George Muir, the father of the other defenders, for the same amount. That the said co-defenders having succeeded to their father's farm and stock, asked him to subscribe the note libelled on, and promised to relieve him of the obligation. That he never paid anything to account of said note, and knew nothing of the marking of £30 on the back.

The Sheriff found the oath affirmative of the reference, and decerned against the defender.

The defender advocated, and the Lord Ordinary, (Ivory), repelled the reasons of advocacy.

The defender reclaimed, for whom appeared *E. D. Sandford*, and *Deas*, who contended that the oath was negative. It was not said in the oath that any debt was now due to *M'Levie*, or that any of the parties on the bill, whether principals or cautioner, had got value. If the pursuer omitted to put these questions, it was his own fault. But at all events, there was clearly no value received by *Boyd*, who was a mere cautioner for the others, both in the first bill and that libelled on, which was a renewal of it. See *Drummond*, 12th Jan. 1848.

J. Campbell, with whom the *Dean of Faculty*, (*Inglis*), maintained that the oath was affirmative. The defender had admitted value received in the shape of accommodation for his friends, and, at all events, by granting the bill libelled on, he had obtained protection from the liabilities of the first bill, which was retired by means of the second. *Laidlaw*, 31st May 1826; *Wilson*, 3d March 1850; *Christie*, 19th June 1833.

THE LORD PRESIDENT. The fair import of the oath is, that the first bill was taken out of the way by this one. When a party signs a bill as cautioner, it is a fair question whether the principal party got value. But this is the case of a renewal of a bill, and he is in a totally different position. As long as the first bill was not prescribed, there was the presumption of onerosity against him, of this he has got rid by granting the second. There was, therefore, value received for the second by all concerned in the first. This is the converse of the case of *Drummond*.

Their Lordships concurred. *Adhere.*

Campbell and Smith, S.S.C., Pursuers' Agents.

Wight and Livingstone, W.S., Defenders' Agents. (W. H. T.)

SIR THOMAS MONCRIEFF, PETITIONER.

No. 98.

Entail—Improvement—Entail Amendment Act—Montgomery Act.—In a petition to uplift and apply consigned money to the extent, *inter alia*, of three-fourths of the sum contained in a decree of constitution obtained under the Montgomery Act, the Court refused to reserve in their interlocutor, the right of the petitioner afterwards to claim the remaining fourth, in respect that there was no allusion to such reservation in the prayer. *Opinion* that his right so to claim was not thereby prejudiced.

1st Division. This was a petition by the heir in possession of the entailed estates of Mon-
 Jan. 28. 1853. crieff and others, for leave to uplift and apply various sums consigned by
 different railway companies, as compensation money, in repayment of money
 already expended by him in improvements, and for other improvements con-
 templated by him. (§ 26 of Entail Amendment Act.) *Inter alia*, the
 petition referred to the sum contained in a decree of constitution obtained by
 the petitioner in 1844, under the Montgomery Act, for money spent in im-
 provements; but in accordance with the provisions of that Act, the prayer to
 uplift and apply was limited to three-fourths of the sum contained in the de-
 cree. There was no reservation craved in the petition of the petitioner's
 right to claim the remaining fourth at any future time.

Sir T. Mon-
 crieff Petition.

A remit to report on the proceedings had been made to Mr Baillie, W.S.,
 who, in his report, recommended that the interlocutor approving the report,
 and granting the prayer of the petition, should contain such a reservation.

E. F. Maitland, for the petitioner, now moved the Court to insert the re-
 servation.

The Court refused to do so, on the ground that it was not craved in the
 petition, and that it might appear that the Court thereby committed them-
 selves to an opinion in favour of the petitioner's claim to the remaining fourth.

LORD FULLERTON, however, observed, that he did not consider such a re-
 servation necessary, and that its omission would not prejudice the right of the
 petitioner to make at any future time an application similar to the present,
 with regard to the fourth part in question.

LORD CUNINGHAME concurred, and the other Judges did not dissent.

Mackay and Howe, W.S., Petitioner's Agents.

(W. H. T.)

No. 99.

FALCONER v. THE ABERDEEN RAILWAY COMPANY.

Railway—Lands Clauses Consolidation Act—Compensation—Tenant.—The tenant of lands
 through which a railway passed entered into an arbitration with the company, with regard
 to compensation, which proved abortive. He then served a notice upon them, claiming,
inter alia, a certain annual payment for each year yet to run of his lease, (without reducing
 his claim to a slump sum,) and calling upon them to take steps to have it settled by a jury.
 The company having made no reply, and not having applied for a jury, the tenant, after
 the lapse of twenty-one days, raised an action concluding for payment in terms of his notice,
 under the 36th section of the Lands Clauses Consolidation Act, 8 and 9 Vict. c. 19. The
 action dismissed, in respect that the amount claimed was not distinctly stated in the
 notice:—*Held*, however, that the pursuer was not barred from the course which he had
 adopted—either by the previous attempt at settlement by arbitration, or in respect of his
 being only tenant of the lands, or in respect that the lands had already been entered upon
 by the company.

1st Division. The defenders obtained their Act in 1845, and in it was incorporated the
 Jan. 29. 1853. "Lands Clauses Consolidation Act" of that year.

This was an action at the instance of the pursuer, who is tenant, under a
 nineteen years' lease, of certain lands through which the defenders' railway
 passes, claiming compensation, under the following circumstances:—

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The pursuer had, along with his landlord, originally entered into a submis-
 sion with the defenders to determine the amount of compensation, in terms of
 sections 23 to 35, inclusive, of the Lands Clauses Consolidation Act. The
 submission gave power to the arbiters to make their award within a year and

day, or before such other time as they should prorogate to. The submission, Jan. 29. 1853. however, fell, in consequence of no award being given within that time, and no prorogation being made.

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The pursuer, then, on 30th October 1849, sent the following notice to the company:—"I, Robert Falconer, farmer, residing at Buckie mill, in the parish of Glenbervie, as lessee and occupant of the farm, mill, and mill lands of Newmill, in the said parish, under a lease for nineteen years, and crops from and after Whitsunday 1839, hereby intimate to the Aberdeen Railway Company, that I claim compensation from the company to the amount of,—

"1st, L.65 for temporary past due damages, with interest thereof since January 1847, and until paid.

"2d, L.40, yearly for the three years and crops, commencing with crop 1847, with periodical interest thereof since due, and until paid.

"3d, L.70 as the yearly and permanent damages during the remainder of said lease from Martinmas next, all in respect of land taken off my said possession of Newmill by the line of the said railway, and for damages already sustained and to be sustained by me by the works executed and to be executed in connection with the said railway; and I hereby give notice of my desire to have the amount of said claim determined by a jury, unless the said company be willing to pay the amount of compensation as claimed, and enter into a written agreement for that purpose, all in terms of the Lands Clauses Consolidation (Scotland) Act, 8 and 9 Vict. c. 19."

The company took no notice of this, and neither agreed to pay the sum demanded, nor took any steps to have it determined by a jury, and on the 8th of December following, the pursuer raised the present action before the Sheriff. In his summons he concluded for the value of the sums contained in the notice of 30th October, founding on the 36th section of the Act, which provides—

"But if any party entitled to any compensation in respect of any such lands or interest therein exceeding L.50, as aforesaid, shall desire to have the amount of such compensation determined by a jury, it shall, in like manner, be lawful for him to give notice in writing to the promoters of the undertaking that such is his desire, stating, in such notice, the nature of the interest in such lands, in respect of which he claims compensation, and the amount of compensation so claimed by him; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose, then, within twenty-one days after the receipt of any such notice from any party so entitled, they shall, unless the question shall previously have been agreed to be settled by arbitration, present their petition to the Sheriff to summon a jury for settling the same in the manner hereinafter provided; and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any competent court." And on the 37th section,—“And it is further enacted, that before the promoters of undertakings shall present their petition for summoning a jury for settling any case of disputed compensation, they shall give not less than ten days' notice to the other party of their intention to cause such jury to be summoned: and in such notice, the promoters of the undertaking

Jan. 29. 1853. shall state what sum of money they are willing to give for the interest in such lands sought to be purchased by them from such party, and for the damage to be sustained by him by the execution of the works."

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The pursuer founded his action on these clauses, maintaining that the arbitration having failed, he was entitled to serve the notice above mentioned upon the company, and call upon them either to agree to pay the sums demanded, or to have it determined by a jury. That they, having failed, within the statutory time, to take the necessary steps for the latter course, must be decerned to pay the full amount of the claim.

The Sheriff assoilized the defenders, mainly on the ground that the 36th section did not apply to cases in which arbitration had been originally determined upon, and that the company were therefore still entitled to have it determined by the verdict of a jury.

The pursuer advocated, and the Lord Ordinary (Robertson) altered the judgment of the Sheriff, and the defenders reclaimed.

For whom *Penney, Christison*, and the *Dean of Faculty (Inglis)* contended, that the 36th section only applied when no arbitration had been resorted to; the 35th section provided for arbitration, and the 36th, beginning with "but," was placed in antagonism to it, and intended for those cases in which the party should choose *ab initio* the alternative of a jury trial. That the present claim fell therefore under the 35th section in connection with the 37th, *et seq.*, by which the results of the failure of arbitration are regulated. That the 36th section did not apply to the case of tenants, which were provided for in the 112th to the 115th sections. That the provisions of the Act did not apply to lands already entered upon, see sec. 17, constituting the preamble of the rest; and that the notice served by the pursuer was not in terms of the Act, as it claimed compensation for lands permanently taken by the company, which was a landlord's question. That the pursuer had never exhibited his lease, which he was bound to do under section 115, on penalty of being held to be only a yearly tenant. Moreover, the claim was vague, and did not, in terms of the Act, state "the amount" demanded, and was incompetent, in respect that it demanded a prospective annual payment, instead of a fixed sum. The clause 36 was highly penal, and not to be put in force unless the case were very clearly proved to fall under it. *Caledonian Railway v. Lockhart*, 12th Dec. 1849; *Nitshill Coal Company*, Dec. 23. 1848, S. 11; *Railston v. York, Newcastle, and Berwick Railway*, 31st May 1851, *English Jurist*, xiv. 1021.

T. Mackenzie, and the *Solicitor-General (Handyside)*, for the pursuer, maintained that he was in the same position as if no arbitration had ever been entered upon. The notice served was regular, there being nothing incompetent in demanding periodical payments. The clause applied to tenants as well as owners, the words being, "any party entitled to compensation in respect of such lands, or interest therein." The other clauses, said to be the only parts of the Act referring to tenants, did not refer to damages, but to abatement of rent.

The LORD PRESIDENT. The Sheriff has decided in favour of the defenders, on the ground of only one of their pleas, and perhaps more was unnecessary.

But we must now enter more fully upon all the views which have been urged. Jan. 29. 1853.
 The first defence is, in respect of the previous agreement to refer by arbitration. This the Sheriff has sustained; but I cannot look upon it as a good Falconer v.
Aberdeen
Railway Co.
 objection, and must on this point agree with the Lord Ordinary. The second is very broad, that tenants do not fall under these provisions at all, but there can be no doubt that they do; the whole series evidently embraces *all who have interest in the lands*. As to the third, I think the clause does apply both to lands already entered upon and those which are intended to be taken; see Lord Campbell's observations in the case of *Railston*. My opinion, however, goes to sustaining the objection founded on the insufficiency of the pursuer's notice. His claim does not seem to me to be in terms sufficiently explicit. The party must shape his claim so that he can get judgment in terms of that claim. This claim does not extricate its own demands. We cannot arrange his claim for him. It is for L.70 for each year of the lease yet to run. It is therefore contingent, for the lease may terminate prematurely. He must, under the statute, state "the amount" of his claim, and the company are entitled to know what they are to agree to or reject. Here they are expected to meet an indefinite demand by a definite offer. How could the proposition between the offer, the demand, and the award of the jury ever have been solved, as the Sheriff would have required to do, had a jury trial taken place? The pursuer may renew his demand in clearer terms, and resort to the verdict of a jury, so that no hardship is inflicted upon him by our judgment.

LORD CUNINGHAME. I concur, but on somewhat different grounds. I agree in holding that the grounds on which the action was dismissed by the learned Sheriff cannot be sustained. But I hesitate to find that it is incompetent for a tenant to set forth the yearly depreciation of the annual worth of his farm, which substantially resolves itself into a claim for abatement of rent, and, I apprehend, falls within the scope of the 112th section of the Act. That clause expressly provides that the apportionment may be settled by agreement between *lessor* and *lessee* on the one part, and the *promoters* on the other, and if it be not so settled, it shall be determined by the Sheriff. The present case appears to me to fall under this clause; and in this view the pursuer's proceedings are defective, for the *lessor* was not called upon at all and is not now before us. Moreover, the Sheriff, and not a jury, ought to have been called upon to determine the apportionment. The non-appearance of the landlord is fatal—*non constat* that the company have not already settled with him. On this special objection, I concur in the proposition that the case in its present shape must be dismissed.

LORD IVORY concurred in the views of the Lord President.

LORD FULLERTON was absent, but sent a note stating his concurrence with the Lord President.

The COURT "recall the interlocutor of the Lord Ordinary submitted to review, advocate the cause, find that in the notice, of date 30th October 1849, given by the advocate, Robert Falconer, to the Aberdeen Railway Company, he did not state the amount of the compensation claimed by him in such terms as to entitle him, under the 36th section of the statute, to maintain the present action against them; sustain the defence maintained by the Aberdeen Railway Company on that ground; but repel all the other grounds of defence

Jan. 29. 1853. maintained by them, assoilzie the respondents, the Aberdeen Railway Company, from the whole conclusions of the summons in the Inferior Court, and decern, reserving to the pursuer still to claim compensation from the defenders, and to make his claim effectual in a competent manner.

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Cunningham and Bells, W.S., Pursuer's Agents.

Webster and Renny, W.S., Defenders' Agents.

(W. H. T.)

No. 100.

PETITION, MRS MARY SWAN or BRIGGS.

Insanity—Curator Bonis.—Circumstances in which the Court sustained an application at the instance of an inmate of Morningside Asylum for the appointment of curator bonis, and granted the application.

2d Division.

Jan. 29. 1853.

Pet., Swan or
Briggs.

This was a petition at the instance of a resident of Morningside Asylum for the appointment of a *curator bonis* for the protection of her rights in an action of count and reckoning in which she was pursuer. In an application to the Sheriff to be liberated from the Asylum, medical certificates were produced, the purport of which was, that although not properly insane, she required to be placed permanently under efficient control, in respect both of her mode of life and the management of her affairs. These certificates and the Sheriff's deliverance were appended to the present application.

Cook appeared for the petitioner.

The LORD JUSTICE-CLERK. Although this petition is somewhat singular, the application is a reasonable one. We shall therefore appoint the usual intimation.

To-day the petition was again called, when,

G. G. Bell appeared for the other parties to the action of count and reckoning, and referred to the case of *Bryce v. Grahame*, 25th Jan. 1828. This jurisdiction of the Court is one which ought to be very guardedly exercised. Cognition is the proper mode of proceeding in a case of this kind.

The Court overruled the objection and granted the prayer of the petition.

John Ross, S.S.C., Petitioner's Agent.

(J. S. M.)

No. 101.

MILNE'S TRUSTEES v. THE PAROCHIAL SCHOOLMASTERS OF ABERDEEN AND OTHERS.

Trust Settlement—Construction—Administration of Trust.—Circumstances in which an endowment for the promotion of education was held to embrace schools other than the parochial schools of the district. Where maladministration is not alleged against trustees, the Court will not interfere in the management of the trust.

2d Division.

Feb. 1. 1853.

Milne's Trustees
v. Paroch.
Schoolmasters
of Aberdeen.

This was an action of declarator at the instance of the trustees and managers under the settlements of the deceased Dr John Milne, providing endowments for the promotion of education in Aberdeenshire, and was raised for the purpose of having it found and declared generally that certain schools, not parochial schools, in Aberdeenshire, are, according to the terms and meaning of these settlements, to be regarded as entitled to participate in these educational endowments; and also that the trustees are entitled to establish rules and regulations for the due administration of the bequest, from time to time, as they see fit, such being always consistent with the settlements, and with

the letters and other writings referred to therein; and that certain rules and regulations set forth in the condescendence are in accordance with Dr Milne's settlement and writings.

Feb. 1. 1853.
Milne's Trustees v. Paroch. Schoolmasters of Aberdeen.

Dr Milne died in 1841, leaving a trust-deed, which proceeds on the following narrative:—

"Considering that I have it much at heart to increase the means of education, especially by promoting the religious and moral instruction of poor children in my native county of Aberdeen, in North Britain, and in the *parish of Nether Banchory* (situated partly in Aberdeenshire and partly in Kincardineshire, where one of my parents once resided), as well as to improve the condition of parochial schoolmasters there, particularly those of the country districts, and having resolved to bestow, for the attainment of these ends, the residue of my means and estate, heritable and moveable, after payment of such legacies as I may bequeath." He therefore conveys his whole property to trustees, and directs that the residue of his fortune, after the other purposes of the will are completed, shall be conveyed to certain public functionaries. The directory words of the deed are as follows:—"And I hereby direct that the said trustees and managers shall apply the interest, dividends, and annual produce of such securities or landed property from time to time, as the same shall become due, for promoting the religious and moral education of poor children, and for improving the condition of parochial schoolmasters in the said county of Aberdeen and parish of Nether Banchory, particularly in the country districts, in such way and manner, and under such conditions, rules, and regulations, as I may appoint by any writing under my hand, however informal the same may be, if sufficiently indicative of my intentions; and in case I shall die without establishing any permanent set of rules and regulations, then the foresaid trustees and managers are hereby authorised and empowered to form and establish rules and regulations themselves, as may be most in accordance with the latest instructions from me, or expression of my opinion contained in any letter or other paper under my hand, whether the same be signed or not, and as the said trustees and managers shall conceive best calculated to attain the ends before expressed. Declaring always, that the income of my said means and estate shall always be applied in such manner as not in any way to relieve the heritors or other persons from their legal obligation to support parochial schoolmasters, or to diminish the extent of such support, and so as not to interfere with the rights or powers of heritors and presbyteries over schoolmasters, or the schools entrusted to their care, as the said rights or powers are by law insured to them." At his death Dr Milne had not framed any rules or regulations for the management of the endowment.

In this action defences were lodged for the parochial schoolmasters of Aberdeenshire, and also for the teachers of certain sessional schools in the town and county of Aberdeen, and district of Buchan.

For the parochial schoolmasters it was pleaded that, according to the true and sound construction of these testamentary instruments, the trustees are not entitled to include the teachers of the sessional schools, &c., within the benefits of the testator's bequest, and that the rules and regulations framed by the pursuers in this particular are *ultra vires* and unwarrantable, and fall to be rescinded.

Feb. 1. 1853.

Milne's Trustees
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of Aberdeen.

The other defenders maintained their right to the benefit of the bequest.

The Lord Ordinary (Robertson) "repels the defences for the parochial schoolmasters of Aberdeenshire: . . . Sustains the pleas for the sessional or parochial schoolmasters of Aberdeenshire and others: . . . Finds, decerns, and declares, in terms of the conclusions of the libel: Finds that the expenses incurred by the whole parties in this action form a proper charge against the trust-estate of the deceased Dr John Milne," &c.

Against this interlocutor the parochial schoolmasters reclaimed, except in so far as it allowed the expenses of all parties to be paid out of the trust-funds.

Shand and Deas were for the reclaimers.

Monro and the *Dean of Faculty* for the respondents.

THE LORD JUSTICE-CLERK was of opinion that the question in this case was wholly a special question, and that no general point, as to the competency of referring to any letters explanatory of the objects of a truster in order to obtain aid in attaching meaning to expressions in his trust-deed, can really be introduced into this case.

The preamble of the settlement sets forth the inductive causes leading the testator to make the settlement: and while there is expressed, on the one hand, the object of improving the condition of the parochial schoolmasters, it is very clear that he proposes that object as a method of improving the means of education, and that the latter is the end, in respect of which he takes into account the propriety of increasing the income of the teachers. Any other view of the objects of the testator would lead to miscarriage in the construction of the settlement. Then the trust-deed entitles and empowers the trustees, if he dies without establishing any permanent set of rules and regulations, to look to all his instructions or expressions of his opinion in any of his letters, to enable them to act in the way they may consider best calculated to attain the ends expressed in the deed. He uses the expression "to form rules and regulations themselves;" and it is said rules and regulations cannot embrace the character of the schools to which aid is to be given. This is a limited and unsound interpretation of that expression in a deed in which the truster intended to repose so much power and confidence in the trustees, and in which he says he gives them that power specially that they may attain the ends above expressed in the way which they shall conceive best calculated to do so.

But, further, the power of collecting his opinion and wishes from his letters is specially committed to *them* as trustees for carrying his will into effect. He thus bestowed on *them* a very large, it may be a very delicate, but still a most comprehensive power to act according to their own discretion; and the more delicate the power, the more *personal* it is to the trustees so selected, and the less are they to be controlled in its exercise. Hence the question whether the schools referred to on record fall within the meaning and directions of the truster is one for the trustees themselves. "I do not say that in this, or perhaps in any similar case, are trustees so beyond the control of the Court, that if any extreme *abuse* of their powers, and a palpable perversion of the funds could be established, the Court might not interfere. But as to the question raised on this record, I think it is one to be decided by the trustees.

They have received a special power, bestowed, I think, precisely for the Feb. 1. 1853. solution of such a point as that which has been raised. The determination to which the trustees have come on this point may or may not be matter of doubt or difference in the opinion of others. But this is a matter committed to them; and on which, on such an alleged error, I do not think the Court is entitled to interfere." But even if necessary to express an opinion on the view which the trustees have taken, his Lordship had no doubt whatever that they had come to a right conclusion.

The other Judges expressed opinions in conformity with those of the Lord Justice-Clerk.

The Court "recall the interlocutor of the Lord Ordinary so far as reclaimed against; and in respect that the trustees in the exercise of the powers committed to them, have, with reference to the letters of the truster, which they are entitled to consider and take into account, framed certain rules and regulations for attaining the ends expressed in the trust-deed, in the way they conceive best calculated to attain these ends, and that no case of abuse or perversion of funds has been stated against the administration of the trust by the trustees; therefore repel the defences stated by the reclaimers, and find that they have stated on record no case on which they are entitled to call upon the Court to interfere with the administration of the trust as conducted by the trustees; Find that it was within the competency of the trustees to make the regulations libelled on, and to include within the scheme the schools of Portlethen and St Fergus, and decern: Find that the expenses incurred by the whole parties in this action form a proper charge against the trust-estate of the deceased Dr John Milne, and remit the accounts thereof to the Auditor to tax and report."

Shand & Farquhar, W.S., Agents for the Reclaimers.

T. & R. Landale, S.S.C., Agents for the Pursuers.

Andrew Fyfe, S.S.C., Agent for Sessional Schoolmasters. (J. S. M.)

FORSYTH'S FACTORY.

No. 102.

Curator bonis—Investment of Trust Funds—Loss—Liability.—A curator bonis to a lunatic invested the lunatic's funds in a second heritable security over a landed property, which being sold did not nearly realise the sum at which it had been valued: The lunatic's funds were in consequence lost:—*Held*, that the curator not having taken proper precautions to have the property valued by competent and skilled valuers, had failed in the requisite caution and diligence incumbent on him in the management of the estate, and was liable to refund the sum thereby lost.

This case came before the Court on a report by the accountant of the Court 2d Division. of Session, on the intromissions and management of John Forsyth, the curator Feb. 1. 1853. bonis to Lewis Robert Hoyes, a lunatic. The curator had invested the property of the lunatic over a property, which being sold, did not nearly realise the sum at which it had been originally valued; and thus the lunatic's property was lost.

The following are the facts of the case as set forth in the accountant's report:—

In the month of March 1841, Mr Patrick Smith of Glasgow, entered into a negotiation with Mr George Cumming, W.S., Edinburgh, the factor's Edinburgh correspondent, for a loan of L.2000 over Craigmaddie, already

Feb. 1. 1858. ^{Forsyth's Fac-}burdened with a debt of L.2300 in favour of Dr M'Turk. Mr Patrick Smith was the partner in business of Mr Henry Gordon, the intending borrower and proprietor of Craigmaddie—and whilst Mr Cumming appears to have been satisfied of the desirableness of the loan, the factor himself did not entertain at first an equally favourable opinion; for he stipulated in a letter to Mr Cumming, "*that a valuation, by a professional man of known character and judgment, of the estate*" shall be shewn to him, and that "*collateral security*" shall be "*given for the regular payment of the interest.*" Mr Patrick Smith obtained and transmitted a valuation of Craigmaddie, by Messrs Baird, wrights and joiners in Milngavie, according to which the property in question was estimated as worth L.6670. This valuation was in general terms, without measurements or separate valuations of the lands and mansion-house. The factor thereupon appears to have satisfied himself of the propriety of the investment, and to have dispensed with collateral security for payment of the interest. Sometime after the completion of this investment, the holder of the preferable security for L.2300 died, and two parties, distantly related to the deceased, appeared to claim his succession, including this bond. A multiplepointing was ultimately raised by Mr Gordon, the borrower, to have it declared who was entitled to the heritable bond, and in the prospect of a settlement of this point, Mr Gordon appears to have set about obtaining a new loan to enable him to pay off the successful party. His partner, Mr Smith again communicated with Mr Cumming on the subject, and a suggestion was made, which was afterwards adopted, "*that Mr Forsyth's bond might be discharged, and a new bond granted to him subsequent to the date of the bond to the new lender.*" Forsyth, the factor, replied to this proposal by expressing every desire to accommodate "Mr Gordon in every possible way, on condition of being kept skaitbless in the matter of expense." The substitution of a new preferable security for L.2300 accordingly took place, and the factor's loan was discharged and reinvested as of a date subsequent to the new preferable loan. The interest on the factor's bond was regularly paid up to Whitsunday 1847, after which it fell in arrear. Mr Gordon, the granter, became insolvent on or about Martinmas 1847. Various procedure then took place with a view to the sale of Craigmaddie; and ultimately, with consent of Gordon's trustee, it was exposed to public roup, and on 26th February 1851, was sold for L.3,750.

The title-deeds of the property were hypothecated to the trustee of the creditors of the late Patrick Dudgeon, W.S. for a large business account incurred to him, which was ultimately compromised for payment of L.500 out of the price of Craigmaddie.

Thus the Baird's valuation of Craigmaddie was L.6670. The prior debt was L.2300, and adding the L.2000 of proposed loan, this, apart from the L.500 carried by hypothec to Dudgeon's creditors, left an apparent margin of L.2570. But when Craigmaddie was sold, it brought only L.3462, 4s., and, therefore, after paying the preferable debt, and the sum due to Dudgeon's trustee, there remained to the *curator bonis* to Lewis Robert Hoyes, in payment of the bond for L.2000 and arrears of interest L.213 : 14 : 5. The discrepancy betwixt the valuation and the price ultimately obtained, was, in the accountant's opinion, far too serious to be explained by any subsequent fall in

the value of such property or deterioration of the particular subjects; and he therefore thought it proper to obtain the opinion of a person of skill on the subject. The result of his inquiries was to confirm him in the impression that Messrs Baird were not competent parties, and that their valuation was altogether erroneous and did not furnish essential details: and, therefore, considering that the factor had not shewn proper prudence in the transaction, he hesitated to take the responsibility of throwing the loss which had accrued upon the factorial estate.

Feb. 1. 1853.

Forsyth's Factory.

The Lord Ordinary on the Bills, (Cuninghame), made avizandum with the report to the Second Division of the Court, and allowed the curator to give in a minute containing any observations or explanations he might have to make in reference to the report.

A minute was accordingly lodged detailing the whole transaction at length.

The COURT again remitted to the accountant to make certain special inquiries in reference to the competency of the Messrs Baird to make a valuation for the purposes of a loan over the lands and mansion-house of Craigmaddie; and the accountant reported, that having obtained the opinions of various parties as to the competency of the Messrs Baird, these did not appear to him to afford any sufficient explanation why the property, if well valued, realised so much less a price by public roup; at same time, he appended to his report these opinions, all of which testified to the respectability and intelligence of the Bairds.

The case was called to-day, when—

Wood and the *Dean of Faculty* appeared for the factor.

The LORD JUSTICE-CLERK considered this was the most important and anxious question which the examination of the accountant into the management of factories had yet brought before the Court. His Lordship was of opinion that there was one plain broad ground of judgment, on which the investment made by this curator could not be defended. Very soon after it was proposed, he was made aware that the proposal came from the partner in law business of Gordon, the intended purchaser. He was made aware that the property was a villa on which a considerable sum of money had already been borrowed, and on which it was proposed to expend the sum then proposed to be raised. While the proposed security was therefore in every point of view undesirable any statements made as to the personal solvency of the intending borrower, by his partner in business, were worth nothing; for, on personal security, the curator would not have been warranted in lending the money. Neither was any inquiry made on that head; and if it had, it would have been found that Mr Gordon was in a most desperate state. Then in this state of things, knowing that L.2300 of the purchase money of this villa remained unpaid, the curator leaves to the partner in business of the borrower, in other words, to the borrower himself to obtain the valuation on which and on the faith of which alone, the loan was made. No precaution was taken to ascertain whether the parties making the valuation were in the habit of valuing property of any kind, and especially of that character with a view to loans, and were conversant with all the considerations which ought to be attended to with reference to the security both for interest and capital. Inquiry would have shewn them to be totally ignorant of that peculiar department of business. (His

Feb. 1. 1858. Lordship proceeded to observe), "Then on whom is this loss to fall? On the helpless lunatic whose whole funds except a sum of L.392 were thus invested, or on the officer of Court paid for the right discharge of his duties, and from whom in such a case the most scrupulous vigilance must be exacted. After full consideration, I have been unable to entertain any doubt on the point; and I am of opinion that the curator must replace this sum with the expenses of this inquiry. The broad principle on which my opinion rests, is this, viz., that the curator took without inquiry the valuation obtained, and transmitted by the borrower himself without any inquiry whatever. Greater rashness or negligence I cannot conceive in such a case. Bad as the proposed security was in every point of view for such a loan, the valuation came to be the *vital* point in the case, indeed the only thing which could warrant the loan; and on a loose and most unsatisfactorily framed valuation produced by the borrower himself, and without the slightest inquiry the money was lent. The curator must bear the risk he ran of that valuation turning out utterly deceptive, as it proved to be."

Forsyth's Factory.

LORD COCKBURN. I am sorry that I cannot differ from your Lordship. I have struggled greatly to find an apology for this public officer, but I cannot. That conduct of the factor might be judged of, on the assumption that he entertained no doubt as to the validity of the security. I am afraid that is no defence. It is the business of a factor to doubt. He is paid for doubting, and clearing his transactions of all risks. Now considering this party is a public officer, and was put by authority to defend a man prevented by Providence from acting for himself, he ought to have been very particular in acting.

I think the security in question is no security at all. I have the greatest compassion for the factor, and who could have had nothing wrong in his intention, but while we are thinking of the feelings of the factor, we are bound to consider the condition of the ward. This lunatic was placed under his protection, and by this act he is reduced to the condition of an absolute pauper, from being in a comparatively comfortable condition. I think therefore, although with regret, that we are bound to make the factor replace the money.

LORD MURRAY concurred.

LORD WOOD. I can have no doubt that, in reference to the transaction in question, the curator and factor was influenced by no other motive than that of discharging his duty faithfully. But I am afraid good intentions are not sufficient to liberate him from responsibility, if he has failed in that degree of caution and diligence which was incumbent on him; and although most unwilling to come to it, I have been unable to resist this conclusion that there has been such failure. The factor was a paid officer, and was himself a man of business; and although he employed another man of business, through whom the loan was in part transacted, it appears that it was by his own judgment upon the whole proposal for the loan that it was ultimately agreed to. In employing Mr Cumming as his agent in Edinburgh the factor may have acted very properly and prudently; but the fact of having done so, and that the making the loan was approved of by Mr Cumming, cannot, in the circumstances, release the factor from liability, if that diligence and circumspection which ought to have been exercised was wanting. Collateral security for the payment of the

interest confessedly was not obtained. It was not insisted for. Now, I cannot but consider even *that* a departure from the prudence which the factor ought to have observed, looking to the nature of the property he was dealing with, and its being in the natural possession of the proposed borrower. But supposing that *that* could be got over, then if no such security was to be demanded, surely it was the more incumbent on the factor to see that the other requisites were fully and rigidly complied with. But was it so? I think clearly not, and that the factor allowed himself to be satisfied (whether by the persuasion of Mr Cumming or not is of no consequence) with what was substantially no compliance with it at all. All that was shewn the factor was a valuation which was procured by the borrower. A valuation, too, with no particulars, but merely a slump sum for the whole houses, land, &c., all included, and giving no explanation of the data or principles on which it was made, and this, as it turns out, by persons who were not properly professional men, nor persons of known character or judgment. I cannot persuade myself, that if the valuation had been obtained from a proper quarter very different information would have been laid before the factor. Nor can I hold that, in the circumstances, it is anything to the purpose to bring forward statements by individuals, that they consider the Bairds very intelligent and responsible people and capable of valuing such property. In short, I am of opinion that the factor permitted himself to be led away from duly following out the correct and necessary line of his duty, and from the course he had originally chalked out for his guidance; that, accordingly, although at least in part apparently adhering to it, he took the mere shadow for the substance, allowing his vigilance to slumber under the influences that had come to operate upon him, and that he thus failed in that diligence and care which he was bound to exert, and must, therefore, be responsible for the loss occasioned by the transaction he was thereby induced to enter into.

The Court pronounced the following interlocutor:—"The Lords, having resumed consideration of the report of the Accountant of Court, in regard to the accounts of John Forsyth, *curator bonis* for Lewis Robert Hoyes, a lunatic, and the second report of the accountant, with the reports and results of the investigations which the accountant was directed to make by the interlocutor of 9th June 1852; approve of the manner in which the accountant carried out the remit made to him by the Court under the said interlocutor; find that, in the whole circumstances of the case, the *curator bonis* was not warranted in lending the sum of L.2000 of the lunatic's funds on the property of Craigmaddie, on the valuation in process obtained by the borrower himself, or his partner in law business, without any inquiry as to the experience, qualifications, or fitness of parties by whom the same was made, or the principles on which the said valuation was framed, or as to any facts whatever as to the said property; find that the whole amount of the principal of the sum so lent, viz., L.2000 sterling, has been lost on the sale of the said property, with L.136:5:7 sterling of arrears of interest; therefore find, that in his factorial accounts, the said John Forsyth is not entitled to take credit for the sum of L.2000, and the interest thereon, so lost to the said estate under his management, as if the same had been duly and properly invested, and that the said

Feb. 1. 1853. John Forsyth is bound to replace and repay the said sum of L.2000, with the interest due and unrecovered of the same, to the estate of the said lunatic, and decern the said John Forsyth to pay the said sum, with the interest, so far as unpaid on the same, from and after Whitsunday 1841, and allow extract-decree to go out in the name of the accountant of Court for the said sum and interest, as the same shall be fixed and ascertained by the accountant of Court; and find the said John Forsyth liable to the accountant of Court for behoof of the estate of the said lunatic, in the expenses incurred by the accountant in the investigation of the said matter, both before and after the remit by the Court for further inquiry, and decern; allow an account of the expenses to be given in, and remit to the Auditor to tax and report; *quoad ultra*, remit to the accountant of Court to proceed in the adjustment of the accounts of the *curator bonis*, on the principle fixed by this interlocutor, and to carry out the same in the accounting with the said *curator bonis*."

Forsyth's Factory.

Mackenzie, Innes, and Logan, W.S., Agents for the factor. (J. S. M.)

No. 103.

CHARLES EATON AND OTHERS, PETITIONERS.

Curator bonis—*Factor loco tutoris*—*Minor pubes*.—The Court refused to appoint under the same petition a *curator bonis* to a minor, and a *factor loco tutoris* to a pupil.

1st Division. This was a petition for the appointment of a *curator bonis* to Margaret
Feb. 2. 1853. Shedden, who concurred in the application, and also for a *factor loco tutoris* to A. W. Shedden.

Eaton, &c.
Petitioners.

On the petition being moved in the single bills, the Lord President observed, that, as no reason was stated why Margaret Shedden should not proceed to choose curators for herself in the ordinary form, the competency of the present application for a *curator bonis* was very doubtful.

Crichton, for the petitioners, stated that there were several cases where the Court, in precisely similar circumstances to the present, had appointed a *factor loco tutoris* to a pupil, and a *curator bonis* to a minor on one petition, although no reason was assigned why the child above pupillarity might not choose curators.

The Court declined to entertain the prayer of the petition *quoad* the *minor pubes*, and appointed intimation, "so far as regards the appointment of a *factor loco tutoris* to the said Arthur W. Shedden."

Tait and Crichton, W.S., Agents.

(W. H. T.)

No. 104.

BUCHANAN v. DOUGLAS AND OTHERS.

Damages, Consequential—*Cautioner in Interdict*.—A pouncing creditor was prevented from carrying out his sale by an interdict at the instance of a party, who claimed the goods as his own, which interdict after two years' litigation, was recalled. About four months after the recall, his sale was again stopped by an interdict at the instance of a different party. This was also recalled, but the landlord immediately sequestrated the pounded goods for his rent. The pouncing creditor sued the cautioner of the *first* interdictor, for damage occasioned by their subsequent proceedings:—*Held*, that in the circumstances of the case, he was not liable.

1st Division.
Feb. 8. 1853.

Buchanan v.
Douglas &c.

Buchanan, the pursuer, had obtained decree for a debt against James

Gordon, merchant in Leith, and, under the warrant contained in the decree, Feb. 3. 1858. had poinded certain furniture belonging to his debtor. A warrant of sale was granted, and the effects advertised to be sold on the 26th September 1846. *Buchanan v. Douglas, &c.*

The sale was prevented by one of the defenders, Michael Anderson, who obtained an interim suspension and interdict, on the allegation that the furniture belonged to him. The interdict was passed on caution, the cautioner for whatever damages the Court might award in case of wrongous interdicting, being the defender, James Torrie Douglas. The question was anxiously litigated, and on the 22d December 1848, the Court repelled the reasons of suspension and interdict, and dismissed it, finding Anderson liable in expenses.

The poiding was wakened on the 14th March 1849, and a new warrant of sale granted, and the sale advertised for the 9th April 1849.

On the day preceding that on which this second sale was to have taken place, it was prevented by the son of Gordon, the debtor, who obtained an interdict from the Sheriff for that purpose, which was afterwards recalled, and the furniture advertised for sale a third time. Before the day of sale, however, the furniture was sequestrated by the landlord of the house, for the rent past due at Whitsunday, and in security of that of the current half-year. The rent past due was, however, paid, but the effects still remained under the landlord's sequestration, when the present action was raised by the poider, Buchanan, concluding for damages, in respect of the loss he had sustained by all these interruptions, against Anderson, the party who obtained the first interdict, Douglas his cautioner, and M'Lachlan the attestor of the latter. It was not alleged by the pursuer that the furniture had suffered injury or deterioration in value.

The defenders, Anderson the principal, and M'Lachlan the attestor, having allowed decree in absence to pass against them, the cautioner Douglas was now the only defender.

The Lord Ordinary, (Robertson), decerned against the defender, finding him liable in damages, to the amount of the original debt, for which the poiding had been executed.

The defender reclaimed, for whom appeared *Muir and Neaves*.

For the pursuer, *Penney* and the *Dean of Faculty*, (*Inglis*).

The LORD PRESIDENT. I cannot come to the conclusion that the interdictor of 1846 is liable for the consequences of 1849. It is not pretended that the furniture was in worse condition in December 1848, when the first interdict ceased, then it had been at the beginning. The pursuer was, therefore, in the same position as before. The poiding was no doubt asleep; but the wakening of it was a matter of fourteen days. He founds on two supervening impediments, the second interdict, and the sequestration. But is the defender responsible for all the applications, wrongous or the reverse, for diligence, which may afterwards be made? There is no averment that Gordon junior, was in collusion with the defender. The defender is, in my opinion, liable only for the plain and direct consequences of the first interdict. The damage took place months after, and at the instance of different parties.

LORDS CUNINGHAME and FULLERTON, (who had at first inclined to agree with

Feb. 3. 1853. the Lord Ordinary), concurred in the opinion of the Lord President, and upon the same grounds.

Buchanan v. Douglas, &c. LORD IVORY concurred.

The COURT "recall the interlocutor of the Lord Ordinary, and assolvie the defender from the whole conclusions of the action."

J. Cullen, W.S., Pursuer's Agent.

Douglas and Johnstone, W.S., Defenders' Agents. (W. H. T.)

No. 105.

J. G. C. HAMILTON, PETITIONER.

Entail Amendment Act, 11 and 12 Vict. c. 36.—When more than one of the consenters are under age, the 31st section of the Act requires separate tutors or curators *ad litem* to be appointed to each.

1st Division. This was a petition at the instance of the proprietor of entailed lands, for
Feb. 4. 1853. authority to grant feu rights, under the Entail Amendment Act, 11 and 12 Vict. c. 36.

Hamilton, Petitioner. Two of the parties whose consents were required were in pupillarity, and the petitioner prayed for intimation to the person who is their guardian and administrator-at-law.

Lord Curriehill reported the case to the Court, on the question, whether these two pupils did not require each to have a tutor *ad litem* appointed. The 31st section of the statute uses the words "a separate tutor *ad litem*, or curator *bonis* or other guardian, to each such party."

H. Pyper, for the petitioner, stated that there had been a diversity of practice in these cases.

The LORD PRESIDENT. The object of the statute is not merely to supply the place of the natural guardian, but to furnish persons capable of *separately* and *independently* considering the question of consent. If there is only one guardian for two pupils, it is only one consent.

The COURT "Find that the 31st section of the Act 11 and 12 Vict., c. 36, which requires the appointment of a separate tutor *ad litem*, or curator *ad litem*, or curator *bonis*, or other guardian to *each* party who is under age, has not been sufficiently complied with by the appointment of G. Robertson, W.S., as tutor *ad litem* to both of the pupils," &c., &c., "supersede further procedure, until an application for a new appointment, agreeably to the said 31st section of the said Act, shall be made."

A. Hamilton, W.S., Agent.

(W. H. T.)

No. 106.

FORMAN v. BURNS AND OTHERS.

Executor—Diligence.—Circumstances which were held to render an executor personally liable for a debt due to the estate, on the ground of want of due diligence in recovering it.

1st Division. This was a reclaiming note against Lord Robertson's judgment, in a multiple-
Feb. 4. 1853 : pointing raised at the instance of the executor of the late Thomas Forman.

Forman v. Burns, &c. In the discussion of the amount of the fund *in medio*, the representatives of the deceased maintained that the executor was personally liable for £250, being the contents of a bill which formed part of the estate. The bill was a

promissory note in favour of the deceased, by Messrs R. M. Connal and W. Hinds, dated 22d Nov. 1842, payable one day after date. The pursuer was, to the extent of one-fourth, himself a creditor in the bill, but his name did not appear on it. He was confirmed executor in March 1847, and gave delay to the debtors in the bill from time to time, and allowed the bill to be renewed, it being, on this occasion, accepted by Connal, one of the original debtors, and by his brother, Mr M. Connal, of the Isle of Man, and containing the interest due upon the former bill. He stated that his object in giving indulgence was to secure the ultimate safety of the debt, as he believed that the premature use of diligence might have the effect of hurrying the obligants into the Gazette. At last, in February 1849, the bill was protested, and a charge served upon the acceptor, R. M. Connal, but nothing appeared to have been recovered under the diligence, and the debtor was stated to be now bankrupt. It was stated, however, that proceedings had been instituted before the Courts of the Isle of Man against the other obligant, and also against the estate of Hinds, who had died there, but that the legal forms of that island gave extraordinary facilities for delay.

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Burns, &c.

The pursuer also stated, that in the whole proceeding he had acted on the advice of Messrs Hutton, writers in Stirling, who had been agents for the deceased.

The Lord Ordinary held that due diligence had not been used, and found the executor personally liable.

The pursuer reclaimed; for whom, *Forman*, and the *Lord Advocate (Moncreiff)*. For the claimants, *Logan, Cook, and Dean of Faculty (Ingles)*.

THE LORD PRESIDENT. This is, no doubt, a very hard case, but I think, upon general principles, that we cannot, without serious results, disturb the interlocutor. The executor seems to have been active enough in making his demand at first, but he was over-indulgent in giving repeated delays, and in allowing the renewal. No doubt he was himself a creditor to a small extent in the bill, but he was not entitled to take others along with him in the risk.

LORDS FULLERTON and CUNINGHAME concurred.

LORD IVORY concurred. This is a very severe result, and by a little encouragement I should have been tempted to dissent. It is a mistake to suppose that a gratuitous executor is liable in *strict* diligence, beyond what he would exercise for his own. I think it is also necessary, in such cases, to aver and prove not only that delay has taken place, but that the loss has been caused by it. Perhaps, however, the result we have come to is the safest for the law of executors.

The Court "adhere."

J. Forman, W.S., Pursuer's Agent.

A. Cassels, W.S., Claimant's Agent.

(W. H. T.)

FINNIE v. THE GLASGOW AND SOUTH WESTERN RAILWAY COMPANY.

No. 107.

Railway—Equal Rates' Clause.—A railway company in whose Act there was an equal rates' clause, that they should charge "equally to all persons, &c. in like circumstances," leased another line whose Act contained no such clause. By the lease the lessor was to pay to the lessee a certain sum on all minerals carried entirely by the latter:—*Held*, that it was

not illegal for them to charge goods taken up by the main line and forwarded by the other, and goods carried entirely by the lessees, according to different rates.

1st Division. The coal pits of the pursuer are situated near the line of the Kilmarnock and Troon Railway. That railway, which is entirely a mineral line, was authorised by an Act passed in 1808, which contained no equal rates' clause, but authorised toll to be levied at a rate not exceeding threepence per ton per mile. The Glasgow, Kilmarnock, and Ayr Railway was incorporated by the 1st Vict. c. 117. That Act contained an equal rates' clause, and a similar clause was contained in a subsequent Act, authorising branches and making amendments. Their next Act, the 5th Vict. c. 29, conferred further powers, repealed the former equal rates' clause, and enacted, that it should be lawful for the company to charge such sums as they should think expedient: "provided always that such charges shall be made equally to all persons in respect of all animals, and of all goods," &c., "or things of a like description and quantity, and conveyed or propelled by a like carriage or engine passing over the same portion of, and over the same distance along, the railway, and under the like circumstances, and in respect of all accommodations of a like nature afforded in respect thereto, and no reduction or advance in any of such charges shall be made partially, either directly or indirectly, in favour of or against any particular company or persons."

Finniev. Glasgow and South West. Rail. Co.

In 1836 an Act was passed, enabling the Troon Company to let their line on lease to the Ayr Company. A lease was accordingly entered into, by which, *inter alia*, the Troon Company were to receive a certain sum per mile per ton, on all minerals carried on their line, provided they had been raised on the lands between Kilmarnock and Troon, "on the main line of the railway let, and from which or any part of which lands minerals have been heretofore in use to be carried on the said railway," including the coals from the pursuer's coal-field.

The Ayr Company (now the Glasgow and South Western) make a charge for minerals conveyed along any part of their own original line at a certain graduated rate of so much per mile per ton, according to the distance, and have a published table of such rates. They charge such minerals, however, as pass only along the Troon line, according to another table of fixed rates, higher than that on which they charge on the Ayr line.

The pursuer, from the position of his coal fields, is in the habit of sending his coal entirely by the Troon line to the sea-port of Troon, where it is shipped.

He raised the present action, complaining that he was charged more than parties whose coals were taken up on the Ayr line and forwarded by the Troon line. This, he contended, was an infringement of the equal rates' clause, and concluded for declarator of the illegality of the charge, repetition of the over-payments already made, and that the defenders should be interdicted from exacting such charges in future.

The Lord Ordinary (Robertson) assoilzied the defenders.

The pursuer reclaimed.

For whom appeared *T. Mackenzie* and the *Dean of Faculty (Inglist.)*

For the defenders, *Penney*, and the *Lord Advocate (Moncreiff.)*

The LORD PRESIDENT. The point here is a small one. The pursuer com-

plaints of the charge made upon goods taken up on the Troon line, while a Feb. 4. 1853. different rate is levied on such as are passed on from the other. The two lines are vested in the same body, but still they are different lines in a certain sense. The Troon line was originally for minerals, and the other for passengers, and the former on being leased to the latter, may stipulate for their original charge upon what is their own proper traffic. The equal rates' clause enacts that their charges shall be made "equally to all persons" "*in like circumstances.*" The pursuer does not compare himself with others "*in like circumstances,*" that is to say, sending their goods solely by the Troon line, but with persons in different circumstances. The tables of the Troon line ought to be so constructed and displayed as to make it perfectly clear that this difference is limited to goods *taken up* by them. The pursuer, however, cannot plead that he was ignorant of the mode of charging.

Finnie v. Glasgow and South West. Rail. Co.

LORD FULLERTON. The whole turns on the "equal rates' clause" of the 5 Vict. c. 29. The pursuer contends that the equality enforced is not relative or contingent, but absolute. But this can only be maintained upon a partial reading of the clause; for, taking the whole clause together, it is evident that the object of it is not to prevent the company from making different rates of charge, but from making different rates of charge with no other motive but that of favouring one individual, or one set of individuals, when there is no essential difference in their circumstances, warranting any such distinction.

It is clear that if the circumstances are not alike, the difference of rates, though charged for the same distance, and on the same portion of the line, is no violation of the clause, unless done "*under like circumstances.*" Such difference of circumstances must be real and substantial. They are so here; for there is, by the contract of lease, a certain rate paid to the Troon Company by the Ayr line on minerals raised on lands between Troon and Kilmarnock, and carried along the Troon line, which includes those belonging to the pursuer.

LORDS CUNINGHAME and IVORY concurred.

The COURT therefore adhered.

Walker and Melville, W.S., Pursuer's Agents.

Gibson-Craig, Dalziel, & Brodie, W.S., Defenders' Agents. (W. H. T.)

FORBES LEITH v. BLAIKIE and OTHERS.

No. 108.

Deed, revocable or irrevocable—Condition in restraint of marriage.—A lady who was possessed of funds to a considerable amount, executed, shortly after the death of her husband, a trust conveyance of her whole property, for behoof of her children, in the event of her second marriage, or death, on the narrative, chiefly, that the provisions contained in her antenuptial contract in their favour were altogether inadequate. After an interval of about two years, she executed a duplicate of this deed, which duplicate was recorded. Subsequently, she brought an action of reduction and declarator, for the purpose of having these deeds set aside, on the ground, first, that they were of the nature of provisions *mortis causa*, and, therefore, revocable; and, second, that the restriction contained in these deeds involved a condition in restraint of a second marriage, to which no legal effect could be given.

Held, 1st, That in so far as the effect of these provisions was dependent on the occurrence of a second marriage, the deeds were of the nature of provisions *inter vivos*.

2d, That notwithstanding the restraint on the pursuer entering into a second marriage, the deeds were effectual to convey the *fee* of any property which she might possess, although not to convey her *liferent* interest.

Question as to the effect of these deeds, in so far as regarded any property which the pursuer might acquire subsequently to a second marriage?

Jan. 25. 1853.

Leith v.
Blaikie, &c.

This was an action of reduction and declarator, at the instance of Mrs Wilhelmina Helen Stewart or Forbes Leith, relict of the late Lieutenant-Colonel James John Forbes Leith of Whitehaugh, against her children and others, defenders, to have it found and declared that she was entitled to revoke and annul, to the extent and effect mentioned in the summons, certain deeds executed by the pursuer since her husband's death.

The nature of the case, the material parts of the deeds, and the authorities referred to are fully stated in Lord Rutherford's interlocutor and note, which have been acquiesced in, and which are as follows :—

25th January 1853. The Lord Ordinary having heard parties' procurators and made avizandum, and considered the closed record, writs produced, and whole process ; Finds that the deeds libelled are valid and effectual, in so far as regards the fee of any property or funds belonging to the pursuer in fee at their date, or that may belong to her in fee previous to any second marriage she may contract, and to that extent sustains the defences, assoilzies the defenders, and decerns ; Finds that the conveyance of the pursuer's liferent in the said property or funds, and the conveyance of her annuity is ineffectual and cannot be enforced in law, therefore, to that extent, reduces the deeds libelled. and decerns and declares accordingly, and reserves to all parties the effect of the said deeds with respect to any property which the pursuer may acquire subsequent to any second marriage, and which may belong to her at her death, and finds no expenses due, and decerns. **AND. RUTHERFURD.**

Note.—The pursuer of the present action, married in 1827 Lieutenant-Colonel James John Forbes Leith of Whitehaugh. These parties executed an antenuptial marriage-contract, on the 26th November of that year, to which reference will afterwards be made. Several children—of whom those now alive, are defenders—were born of the marriage. The pursuer became a widow in September 1841, and, on the 25th of April 1842, she executed the deed which is more immediately the subject of this action. That deed is a conveyance in trust to certain trustees, including the executors under her father's settlement, and who had also been named as trustees in her contract of marriage.

Without now adverting to the import of this deed, which must be fully considered, it may be proper to state in the outset, that on the 25th July 1842, a deed was executed by the pursuer, binding herself to implement and carry into full effect the trust-deed of April 1842, and of new confirming the nomination and appointment of the trustees. To this deed the trustees became parties. The trust deed of 1842—for what reason is not stated on record—was afterwards executed in duplicate, or rather repeated, of date the 7th of March 1844. Mr Kenneth Mackenzie Thorburn, having come to be the surviving trustee, executed a deed of assumption, under which the defender, Mr Blaikie, appears to be the only acting trustee.

The object of the action is generally to have it declared that the pursuer is entitled to revoke and annul the trust-deed of 1842, and all that has followed upon it, in so far at least as that deed conveyed in favour of her children her own liferent in the event of her entering into a second marriage, or any further or more extensive right, in the property then belonging or that should thereafter belong to her, than they possessed under her marriage contract, but

under reservation of the rights of her children as fixed by that contract; and Jan. 25. 1853. to declare that the trust conveyance of 1842 and subsequent deeds are no otherwise, or to a greater extent, obligatory against her, and specially, that in the event of her entering into a second marriage, she should have the full enjoyment of her property, and be entitled to dispose of the same under the provisions of the said antenuptial contract of marriage. This action embodies a reduction in aid of the declaratory conclusions. The parties called as defenders are the surviving children of the marriage and the trustee under the trust conveyance, who maintain those deeds to be delivered and irrevocable, and that the conveyances and provisions thereby made in favour of the children are no longer liable to be affected by any deed of the pursuer.

Leith v.
Blakie, &c.

The case raises questions of novelty and importance, and not without difficulty; but it is necessary—before stating or considering these—to ascertain clearly the import of those deeds as to which the parties are not quite agreed. The marriage contract of 1827 would appear to present no difficulty; by that instrument, Lieutenant-Colonel Forbes Leith, the husband, gives to the pursuer an annuity of £300, secured over his heritable estate, and binds himself to pay to the children, if there should be three, or more than three—which was the case—£4000, at the first term of Whitsunday or Martinmas after his death. On the other hand, the pursuer—accepting those provisions as in full of her terce and *jus relictæ*—conveys to certain trustees, “all lands, heritages, debts, heritable and moveable, goods, gear, sums of money, and all other property, heritable and moveable, real and personal, at present pertaining and belonging, or which may hereafter pertain and belong to the said Wilhelmina Helen Stewart, or to which she has now, or may hereafter have or acquire right or claim in any manner of way, and particularly without prejudice to the foresaid generality,” her whole rights and interests under her parents’ contract of marriage, and her father’s settlement, and her uncle’s will, and her grandmother’s settlement, all in trust, more particularly, *tertio*, “the whole residue” (being the residue after deduction of certain expenses and preferable purposes under the different settlements referred to) “of the funds and effects, heritable and moveable, real and personal, of the said Wilhelmina Helen Stewart, or to which she has or may hereafter have right or claim in any manner of way, including the succession of her late grandmother, as well as any sum or sums of money which may be owing to her, or her said executors or trustees, by the said William Kerr, her uncle, shall be held and applied by the said trustees for behoof of the said Wilhelmina Helen Stewart, in liferent, during all the days of her lifetime, for her liferent use alienably, and the use and behoof of her issue or children by the said intended, or by any future marriage, equally and proportionally among them in fee.” The contract excludes the *jus mariti* of Lieutenant-Colonel Forbes Leith. The pursuer reserves to herself a right to burden the trust-estate to the extent of £1000, payable at the first term of Whitsunday or Martinmas which shall happen twelve months after her decease. It does not appear that any of the other provisions of the marriage-contract are of importance.

The Lord Ordinary thinks there can be no doubt of the import and effect of this antenuptial contract. It is hardly necessary to observe that the deed was granted for the highest consideration known in law. It was a *de*

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praesenti conveyance of all her property in trust to trustees, for behoof of herself in liferent, for her liferent use alienably, and to the children of that marriage, or of any future marriage she might enter into, equally and proportionally in fee. The conveyance appears to reach *acquirenda* as well as *acquisita*. The defenders, the children born of the marriage, are essentially creditors under the contract, but their *jus crediti* is limited. It does not extend to the proceeds of the estate during their mother's life, her liferent being fully reserved, nor does their *jus crediti* entitle them to exclude the children of any future marriage from an equal and proportional share in the mother's estate. The observation is important with reference to the deed which she afterwards executed. In the event of becoming a widow, the pursuer not only had her own liferent at her disposal, but the children of the first marriage could not have interfered with the claims of the children of any future marriage, to an equal and proportional share of the property, whether such issue of such future marriage claimed under marriage settlement or otherwise.

In this situation, the pursuer having become a widow by her husband's death in September 1841, executed the conveyance, which, with the deeds consequent upon it, is now brought into question. It proceeds upon the narrative of the marriage contract, and upon the further narrative "that the said Lieutenant-Colonel James John Forbes Leith, died in the month of September last, without having made or left any other settlement than that contained in the antenuptial contract before mentioned, and whereas the provisions thereby and above mentioned, for and on behalf of the children now existing of the said marriage betwixt him and me, prove to be wholly inadequate, according to the most favourable construction which can be put upon the several clauses of the said contract, applicable to and regulating these provisions, and which contract in these respects, ought, and was at the time it was entered into, intended to have been more justly and favourably expressed towards the said children, particularly in regard to their maintenance, or support and education, according to the fair and true meaning and stipulations of the parties: With the view therefore of so far rectifying the said defects, and furthermore, *with a view to the events and contingencies underwritten*, and particularly for the purpose of preserving my whole means and estate to my children after named, and exclusive in a special manner of the *jus mariti*, or other rights, and the debts or deeds of any husband I or my daughters may have: In order also effectually to secure and regulate the present and ultimate distribution and settlement of my whole means and estate now belonging and due, or which shall belong and be due and addebtied to me, in so far always as I have right, title, and power, now and irrevocably to dispose of and settle the same by and under, or notwithstanding of the said deeds and contracts, both executed on 26th November 1827, or other deeds, contracts, dispositions, assignments, settlements, or writs and documents whatever, by me or on my part, but under reservation to the trustees as after written, of power and liberty to them to pay over to me, by way only of alimentary provision and allowance, the jointure and annuity, with the interest of said means and estate, and right of interim application and distribution of said annuity and interest, or proceeds of the capital or stock to me, and among my children after named, in the several events, and subject to the several conditions, burdens, and stipulations, or rules after mentioned."

Upon this narrative, the pursuer conveys to the trustees "for behoof of my- Jan. 25. 1853.
self in liferent allenary, and in the event of my marrying again, only till that Leith v.
event, or so long as I remain single and unmarried, and to the children or issue Blaikie, &c.
 after named of the said marriage between me and the said Colonel James John Forbes Leith, in fee, equally and proportionably share and share alike, all and sundry lands and heritages, annual-rents, rights, and heritable subjects, and all and sundry debts, heritable and moveable, *presently belonging, or which shall pertain and belong, or be due and addebted to me, and, in general, the whole means, estate, and effects above mentioned, whether heritable or moveable, real or personal, of what kind or nature soever, and wherever situated, with the whole writs and titles, vouchers and instructions of the same, including the fore-said jointure or annuity of £300, payable furth of," &c.* The purposes of the trust are declared to be for payment of debts prior to the 1st of January 1842, "*also for payment of such debts as may be thought just and proper, and as may be hereafter contracted or incurred by me, with consent of my said trustees, while I remain single and unmarried, but not otherwise* ; and for payment of my death-bed and funeral charges, with the bequest or legacy under mentioned, together with the expenses attending the trust ; *Secundo,* For payment to me exclusively, and so long only as I shall remain the widow of the said James John Forbes Leith, or whilst I am single or unmarried, but not otherwise," not only of the said jointure, but of the free proceeds of the trust estate ; declaring that she should not be entitled, without consent of the said trustees, to dispoise or burden the said jointure or proceeds, or any part thereof, "and particularly in the event of my entering into or contracting a second or future marriage, the said payment to me in the meantime of the said proceeds, held hereby to be purely alimentary, shall not only cease and determine, but, in the event foresaid of my said future marriage, it is further declared that the same, with the principal or capital, including, as said is, the interest or produce, rents, dividends, and profits, shall not be liable or attachable by any form, shape, or construction for the debts of any husband I may have, nor be subject to attachment or other diligence ; but that notwithstanding of such sale, assignation, transfer, or other conveyance, attachment, or other diligence, or any marriage I may enter into or contract, the entire annual proceeds of my said means and estate, with the whole estate itself, is, and shall be held for, and devolve upon, and vest in my said trustees for my children and others as follows."

By the third purpose of the trust, she appoints "*my said trustees and their aforesaid, as soon as may be thought by them most convenient and prudent after I marry again, or on my death, whichever event shall first happen,*" to divide the proceeds, *including her jointure*, amongst her children, "declaring hereby, that the shares so provided and allocated to each of my said children shall be delivered and paid over to them as soon after my decease or marrying again, whichever event shall first happen, as my means and estate shall be converted into cash, or otherwise brought into such a situation as to enable my said trustees and their foressaids to make a general division, and that the same shall devolve to my said children accordingly on my decease or marrying again, whichever event shall first happen."

It does not seem necessary to refer to the other purposes of the trust except the last, by which the pursuer revokes and alters "all former dispositions, assign-

Jan. 25. 1853. nations, or settlements executed by me in prejudice hereof, and I hereby declare this present conveyance good, valid, and effectual, and to be immediately and irrevocably acted upon by my said trustees, in so far as possible, from the date hereof as above written, under the reservation, appointment, or assumption and declaration foresaid, surrogating and substituting my said trustees in my full right and place of the premises."

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The deed was no doubt executed *intra annum luctus*; but little can be founded on that circumstance, as the pursuer repeated the deed by executing it of new and in duplicate in March 1844, and had in the interim granted a deed of homologation and assumption of trustees. Further, the deed was delivered and recorded under a clause of registration. It is declared also to be irrevocable, not only in the dispositive clause, but very emphatically in the last clause declaratory of the trust. There can be no doubt that at the time it was executed, whether originally or subsequently, the pursuer intended it to form a final and irrevocable settlement of her estate. On the one hand, therefore, the deed excludes all power of revocation; and, on the other, no extraneous circumstances connected with its execution are averred on which to found a reduction. The argument for the defenders, is, that the deed must stand good; that it is not properly a *mortis causa* deed, but an immediate and *de presenti* conveyance by a deed declared irrevocable, delivered and recorded, of all the grantor's property in favour of her children, reserving her own life-rent while she remained unmarried; providing for the payment of existing debts, and with the power of contracting future debts, with consent of her trustees, while she remains unmarried, which consent it may be assumed that the trustees could not unreasonably or capriciously refuse. They add, that the deed is, to a great extent, supported by the previous contract of marriage; that, in other respects, it rests upon the best considerations, namely, the inadequacy of the provisions for the numerous children of her late marriage; that the provision restricting her own life-rent and right of contracting debt to the continuance of her widowhood, was not only not illegal but quite reasonable, as she had it in her own power not to enter upon any second marriage except with a husband, who, out of his own means, could support her as a married woman, and provide for her in the event of her second widowhood. And they obviate the remark, that the deed would carry to the trustees any fortune she might acquire through her second marriage, by stating that they do not construe the deed as conveying in the event of her second marriage any property which might not be in her possession at that time, giving the deed the full effect of an ultimate settlement in the event only of her decease without contracting a second marriage.

This argument on the part of the defenders is plainly, to a great extent, conclusive, and there is much of it of which the pursuer does not deny the force; but she contends that the views of the defenders avoid the true question at issue. The pursuer admits entirely the rights of the children to the extent of their *jus crediti* under the marriage contract, and she seems little inclined to dispute that the *jus crediti* extended to the fee of the whole subjects thereby provided, restricted only in favour of issue, if there should be such, of a second marriage. The Lord Ordinary may observe in passing, that such is the true construction of the marriage contract, which, while it

provides the whole fee to the issue of the pursuer's body, secures the issue of Jan. 25. 1853.
 her first marriage to the extent of one half, but that security does not affect
 their further rights as issue of her body, if the second marriage did not give Leith v.
 issue to interfere with the rights of the children of the first marriage as con- Blaikie, &c.
 stituting her whole issue. But, while the pursuer makes this admission, she
 maintains that the deed was not merely gratuitous, but was granted for the
 very object and purpose of restraining her from a second marriage; that
 though she might have no power to recall the deed simply as gratuitous, as no
 solvent party could be prevented from granting a deed disposing of his pro-
 perty, even without consideration, especially to persons towards whom the
 granter was at least under natural obligation, the case was quite different where
 the consideration was absolute restraint of marriage—a consideration which the
 law would not recognise. That in this case she stipulated, in the event of her
 second marriage, the conveyance to her children, both in fee and liferent, of
 every farthing she possessed; conveying, in that event, to the trustees, the
 very annuity which they would continue to draw, in her right as widow of her
 first husband, and depriving herself not only of the means of providing for any
 children she might have by any other marriage, but reducing herself, and pos-
 sibly her future family, to absolute destitution and beggary, in the event which
 might happen, and against which this deed contains no provision, namely, the
 decease or the failure of her second husband, leaving her, and it might be,
 children too, absolutely unprovided. The defenders, it is further maintained,
 can have no right or interest except by founding upon the deed as restraining
 marriage, at least so far as regards the pursuer's liferent of the whole funds,
 because she is not now married; and if she does not marry, the liferent is her
 own. By preventing the pursuer from marrying, they do not hold or acquire
 anything, and the case therefore resolves into this, that they insist upon the
 forfeiture of her liferent in the event of her marriage; though, if the threat of
 forfeiture affect her resolution, they can take no advantage. The case, it is
 said, is just the same as if the pursuer had granted a bond and obligation not
 to marry again, enforcing the bond by a penalty, that if she should marry
 again, she should convey her property, to the last shilling, in favour of the
 children of her first marriage. Such an obligation and such a penalty, it is
 contended, could not be enforced, and the same objection lies to the enforce-
 ment of this deed—that it does, in fact, contain such an obligation under the
 clause, by which she binds herself to execute additional deeds, but that the
 form of the deed, as a *de presenti* conveyance, cannot difference the case; and
 that, if she is not bound to convey, in implement of the deed, property not
 formally conveyed, the actual conveyance will be ineffectual or subject to re-
 vocation; and further, that she now seeks to declare it revocable, and to revoke
 it, before the children can say they have acquired any direct right to her life-
 rent, as the event has not yet happened which vests it in trustees for them.

In considering the case, with reference to the grounds of action thus ex-
 plained, it may be asked, whether the whole of this deed must be annulled, in
 respect of the illegality of the condition, or that part only which is more im-
 mediately referable to the condition, as the ground and consideration of the
 deed?

The Lord Ordinary is of opinion that the case, in this respect, is clearly

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separate. He sees no ground on which effect should be refused to the deed, in so far as it conveys to the children the fee of the estate. To this extent the conveyance is absolute and unconditional. It proceeds upon a consideration fully justifying it; namely, her numerous family and the inadequacy of the provisions left them by their father, or secured to them by her marriage contract. It interferes with no *jus crediti*, as it is granted under payment of her existing debts, and under reservation to contract future debts with consent of her trustees. The Lord Ordinary thinks, that so far the deed in question is fully supported by the principles given effect to in the case of *Turnbulls v. Turnbull's Trustees*, as decided in the House of Lords, 15th April 1825, and *Smitton v. Smitton's Trustees and others*, decided in this Court, 12th Dec. 1839. These cases are certainly conclusive, construing the deed as conveying the property which presently belongs to the granter, though there may be ground for reserving the effect of the deed, if it shall ever be grounded on as a general disposition and settlement conveying the whole property which she might have at her decease. The defenders seemed inclined to put upon it the more limited construction.

But there is another part of the deed which opens a question of greater importance, and that is, the effect of the stipulation or condition of conveyance by which the pursuer gives up her reserved liferent, all right and interest, in short, in the funds conveyed, making over her whole property without reservation (the reservation in the fourth purpose of the trust need scarcely be regarded) in the event of her contracting a second marriage. This opens a question of difficulty, and in circumstances of novelty, regarding the validity of obligations or deeds granted in consideration or for the purpose of restraint of marriage, and reference was made to some authorities, which it would be very easy to extend to an almost indefinite length, in the civil law, in the law of France, and other foreign law, and in the law of England, as well as in our own. So far as regards the civil law, and the law also of France, the Lord Ordinary thinks a very instructive discussion will be found in *Merlin Repertoire de Jurisprudence*, vol. xviii., *voce "Viduité,"* and vol. iii. *voce "Condition."* Reference was also made to the discussion in *Voet ad Pandectas*, book ii. tit. 14, and book xviii. tit. 7.

The authorities just referred to will lead to much more extensive reference, if that should be required. Most of the cases touched by these authorities regard bequests or donations, granted either expressly or by implication in restraint of marriage, and little, comparatively, is said of contract or direct obligation resting on such consideration, and intended to have such effect. The question, with reference to bequest especially, has run into the nicest distinctions; the civil law, varying in its principles according as it altered its views with respect to encouragement of marriage, and it did not apply the same rule in the case of a widow and a maid. The view taken upon bequest appears generally to have been, that if the condition attached to a bequest was illegal, it should be held as not written, and be disallowed, either as having been meant merely *in terrorem*, or as having been spoken by a testator not in earnest, or as having been introduced for a purpose which the law would not sanction, because it tended to defeat the law. Acting on this principle, the civil law ultimately disallowed general restraints against a first marriage,

though it gave more favour to restraints against a second marriage. Further, Jan. 25. 1853. it went into all nice distinctions, admitting restraint where directed against marriage with a particular person, or unless with particular consents, at least *Leith v. Blaikie, &c.* during minority, or where the provision, being made to cease merely on marriage, was held not to imply a restraint against marriage, but to be simply a provision during a period when the party, being unmarried, might have no adequate means of provision. In the case of a widow, especially where the provision came from the husband, the condition was still more strongly enforced, and was more easily construed to be a mere provision during her viduity, though declared to be forfeited on the second marriage, and this for reasons obvious enough in ordinary feeling, independently of the stronger motive that might arise from the existence of children, for whom the undivided affection of a parent was sought to be secured. The Lord Ordinary has adverted to the cases of bequest and donation, and to the distinctions referred to, partly with reference to the subtle distinctions that have been taken by jurists in the matter, and partly to the leading principles on which the conditions attached to such bequests have been enforced and disallowed.

The case of contract or obligation stands in somewhat a different position from the case of bequest. The illegal condition might not annul the bequest, but it would annul the contract; for, assuming the consideration to be illegal—taking a condition in restraint of marriage for example, and assuming it to be so general and absolute as to amount to illegal restraint—both parties are equally affected by the illegality; the taint on either side is equal, and neither party can be allowed to enforce the contract, there being no reason here for the exception which has been introduced in the case of bequests, in the opinion of many jurists, upon very questionable grounds.

The English cases, so far as they bear upon bequests, will be found sufficiently stated or referred to in *Jarman upon Wills*, vol. i., p. 836, *et seq.*; and *Roper upon Legacies*, vol. i., p. 757, *et seq.*; and one of the most important and leading discussions on the subject is contained in the report of *Harvy et Uxor v. Sir Thomas Aston and Others*, Comyn's Reports, p. 726, decided by Lord Hardwicke, with concurrence of the Chief-Justices Lee and Willes.

The principal cases under this head relative to contract, will be found sufficiently stated or referred to in *Smith on the Law of Contracts*, p. 130; and the more important cases are *Key v. Bradshaw*, Vernon's Chancery Cases, vol. ii., p. 102; *Baker et Uxor v. White et Alter*, *ibid.* p. 215; *Lowe v. Peers*, Burrow's Reports, p. 2225, decided by Lord Mansfield; *Woodhouse v. Shep-ley*, Atkyn's Reports, vol. ii., p. 535; and *Gibson v. Dickie*, 3 Maule and Selwyn, p. 463.

Without referring to the cases of legacies by will or bequests, which stand upon their own specialties, and must be decided upon different principles, it appears to the Lord Ordinary that the other cases support the conclusion, that a contract having for its object a general restraint against marriage, or resting upon such considerations, cannot be enforced.

With respect to our own law upon the subject of bequests, the parties referred to *Bell's Principles*, section 1785, and the authorities there cited; and upon the subject of contract, to *Bell's Commentaries*, vol. i., p. 301, and to

Jan. 25. 1858. the cases reported in the Dictionary, *voce* Condition, sec. 2; and Stair, b. i., tit. 3., sec. 7.

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Let us deal then with the case that the pursuer had granted to her children directly, or to trustees for them, an obligation that she would not again marry, and binding and obliging herself if she did so, to pay them a large sum; or to keep to the present case, to make over to them her whole property, every sixpence, would the law support that obligation? The Lord Ordinary humbly thinks not. It rests upon no good or legal foundation. Speaking generally, and not with reference to the present case, which might make impossible suppositions very natural in themselves, he thinks it a stipulation, in its direct tendency, against public morals. There is no proper and legal means to enforce it, as the existing children, the creditors, if the penalty operated to prevent the marriage, gain nothing; and the penalty is attached, not to the failure of any duty to the children, for the worst failure, and even a criminal failure, would not carry such consequences, but to an act which neither the law nor public opinion regards with disfavour.

Had the present case, therefore, assumed the form of a bond granted by this lady, the pursuer, to pay over her whole fortune to her children, or to trustees for them, reserving nothing for her own subsistence in any possible circumstances, in the event of her second marriage, the Lord Ordinary owns he should have had no difficulty in disallowing the contract, and refusing to enforce it by aid of law. He thinks the same principles apply to it as a deed of immediate conveyance. In the *first* place, it is a conveyance under conditions, and the question touches the legality and effect of the conditions. The trustees are in possession of the property, but under condition only. The conveyance is not yet absolute in their favour. It may never be. At this moment the trustees hold for the pursuer as well as the children. Except to the extent to which the children are creditors, under the contract of marriage, undoubtedly to the extent of her liferent over the whole subjects, the trustees hold for the pursuer, and for her only. The children, therefore, are not in possession either directly or through the trustees, and the question raised upon the illegality of the condition is, whether the trustees ever shall be in possession for the children during the pursuer's life. The case, therefore, is in no respect that of a party demanding repetition of a sum of money paid under an illegal contract or engagement. The money is not yet paid. The question is, whether the pursuer may not declare the condition illegal, and in respect of its illegality, revoke and recall the declaration, that the trustees in a future possible event shall hold for the children and not for her. In the *next* place, the deed does contain obligatory clauses which raise this very question in the strictest sense. The pursuer binds herself to execute deeds in furtherance of the conveyance. Suppose she had acquired new property the next day, could an action have been brought by the trustees to oblige her to denude? That action, if brought, would necessarily be founded on the obligation to convey, and would raise directly the question. The Lord Ordinary cannot conceive that the present action does not involve the same question, and in circumstances quite as favourable to the pursuer, nor can he hold the transmission to have taken place so effectually and conclusively as to put the pursuer in the more embarrassing position of a party demanding repetition.

The Lord Ordinary has found no expenses due. If the defenders had no funds of their own, he would have been inclined to find them entitled to expenses, as he considers their opposition to the present action, and that of the trustee, to be fair and reasonable; but as they have funds of their own, he thinks it would be hard to subject the pursuer in the expenses of both sides. She is clearly not entitled to the expenses necessary for her relief, from her own improvident, though generous act. Jan. 25. 1853.
Leith v.
Blaikie, &c.

A. R.

Macfarlane and Moncreiff, for the pursuer.

Irvine, T. Mackenzie, and Deas, for the defenders.

Shepherd, Grant, and Cuthbertson, W.S., Agents for the Pursuer.

Hope, Oliphant, and Mackay, W.S., and

Arthur Forbes, W.S.,

} Agents for the Defenders. (R. S.)

ANDERSON (DENNY'S TRUSTEE) v. T. LAURIE & Co.

No. 109.

Retention—Lien—Warehouseman.—A warehouseman or store-keeper has no right of retention over goods in his possession for a general balance due to him.

The pursuer is trustee on the sequestrated estate of D. & A. Denny & Co., and brought this action in the Sheriff Court of Glasgow, concluding for delivery of 782 bolls of wheat, and a quantity of oats, belong to the estate, and lying in the warehouse of the defenders, T. Laurie & Co., who are store-keepers, and refused delivery, claiming a right of retention for a general balance due to them. It appeared, that they had been employed, throughout a long course of dealing, by Denny & Co., who were in the habit of taking delivery of the whole or portions of the lots stored, and of making payment to account of rent and charges at no fixed periods, but as suited their own or the defenders' convenience. Evidence was also led as to the custom and understanding of trade. Certain store-keepers deposed that they had occasionally detained goods deposited with them, in security of a general balance, unconnected with the particular goods, and that in so doing, they conceived that they acted in conformity with the usual understanding of trade. On the other hand, certain grain merchants deposed that they knew of no such general practice or understanding. 1st Division.
Feb. 8. 1853.
Anderson v.
Laurie, & Co.

The Sheriff-substitute, (Sherriff,) and on the case being advocated, the Lord Ordinary (Wood), successively repelled the defence, and decerned for the pursuer.

The defenders reclaimed.

For whom, *G. G. Bell*, and the *Dean of Faculty*, (*Inglis*), contended, that the general principle of the law of Scotland, derived from the civil law, was, that a creditor had a right of retention over any article belonging to his debtor, which might happen to be in his possession by a legal title. This arose from a general rule of equity, and was not founded, like the English law of lien, upon a contract, actual or implied. There might be special cases in which the purpose of the custody, on the part of the creditor, was of so temporary a nature, and his possession of the article so obviously for the very purpose of re-delivering it, that it became an exception to this general rule. Such was the explanation of the well known case of *Harper v. Faulds*, 27th Jan. 1791, M. 2666, and *Bell's Cases*, p. 440, in which, (by a

Feb. 8. 1853. bare majority of the Court), a bleacher was found to have no such right; and the case of shoeing a horse, repairing any article, and such like instances of temporary custody, for a special purpose, were no doubt exceptions. This, however, was the case of a warehouse-keeper, where the very object of the possession was custody for an indefinite period, a purpose so akin to the right of retention, that it obviously fell under the general rule. *Hunter*, 25th July 1794, 2 Bell, 109; *Sturgeon*, 20th Jan. 1813, F. C.; *Stewart v. Fletcher*, 19th May 1829; *Auld & Co.*, 5th July 1810; *Balleny & Co.*, 7th June 1808; *Lord Fife v. General Duff*, 14th Jan. 1840; *Ainslie v. Town of Edinburgh*, 8th Feb. 1842; *Brown v. Somerville*, 13th July 1844; *M'Naughton v. Baird*, 15th July 1852; *Melrose*, 7th March 1851; *Mein v. Boyle*, 17th Jan. 1828, Prof. More's Notes to Stair; *Naylor v. Mangle*, 1 Esp. 109.

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T. Mackenzie, and *Deas*, for the pursuer, maintained that no such universal right of retention was known in the law, either of Scotland or of England. This was not pretended to be a case of factors' lien. Except in that case, there required to be a special connection between the article retained and the debt. The pursuers were willing to allow the claim of retention, in the present case, in respect of parcels, for the custody of which, any part of the debt was due; but only a small portion of the corn in question was in this condition. *Harper v. Faulds*; *Brown v. Somerville*; *Appin's Creditors*, 1760, M. 749; *M'Kenzie v. Newall*, 2d July 1824; *Stevenson*, 18th Nov. 1824; *Holderness*, 1827, Barn. and Cres., vii., 212; *Ersk.* iii. 137; *Cross on Lien*, 259.

THE LORD PRESIDENT. The plea of the defender is very broad. He maintains that the principle of retention extends to all goods of the debtor which may be in the hands of the creditor, for any debt whatever. I agree with the Sheriff, that neither the understanding of these parties, nor the general custom of trade, has been made out in favour of the defender. The right to retain appears to have been occasionally asserted, but there is no proof of its having been effectually established. The custom of trade, therefore, remains doubtful, and we are thrown upon the general principle of law. The case of *Harper v. Faulds*, which has never been departed from, seems to rule this, and I can find no trace of the very broad right of retention here claimed. Some of the cases quoted are between buyer and seller, and don't interfere on either side of the present case.

LORD FULLERTON. I can find no such principle as that contended for, applicable to parties in the defenders' situation. The cases raise the question of the general right of retention, in opposition to the more limited right of lien, pleadable by parties having a limited right of possession. The defenders are compelled to maintain, that the former of these is, in our law, universal, and that the latter is unknown. The fact is, that the amount of retention competent in each case must depend upon its particular circumstances, and, in the present, I find no difficulty.

LORD CUNINGHAME. I consider the judgment of the Lord Ordinary to be founded on the soundest principles of the law of retention. There is no dispute about the facts, and no special understanding, and no general practice has been proved. The case, therefore, depends on general principles, and falls, in my opinion, directly within the rule of *Harper v. Faulds*. The chief

difficulty in the question arises from the case of wharfingers in England being supposed to have a right of lien for their general balance. The exception, however, in their favour arises from a special *usage*, which has not been proved in favour of warehouse-keepers here. And even this wharfinger's lien has recently been doubted. See Smyth's Mercantile Law, p. 510, ed. 1848. I do not believe that the very general right contended for by the defender was ever recognised in ours, or in any system of enlightened jurisprudence.

LORD IVORY. Even Professor More's Notes to Stair, impugning the case of *Harper*, don't touch the present. It falls under none of the classes in which he maintains the right of retention. The adverse authorities, prior to the case of *Harper*, are now exhausted. And in the discussion of *Harper's* case itself, the doctrine of general retention there contended for was talked of as a novelty. This proves that the more limited right was familiar at that time to the Scottish lawyers. Since that decision the rule has never varied. *Brough v. Jolly*, 26th Nov. 1793; *Stuarts v. Fletcher*, 19th May 1829; *Russel v. Lord Breadalbane*, (same volume).

The COURT therefore adhered.

Lockhart, Morton, Whitehead, and Greig, W.S., Pursuer's Agents.

J. L. Hill, W.S., Defenders' Agent.

(W. H. T.)

FRIER (SCOON'S TRUSTEE) v. MRS E. HOGG OR KERR, AND HUSBAND. No. 110.

Bill of Exchange—Onus probandi.—Circumstances, statements, and contradiction on the part of the holder of a bill, which were held sufficient to overcome the presumption in favour of its genuineness and onerosity.

This was an action upon a bill for £198, drawn by Scoon upon, and accepted by the now deceased Alexander Hogg, the father of the defender, Mrs E. Hogg or Kerr.

1st Division.
Feb. 8. 1853.

The action was originally at the instance of Scoon, but was now adopted by Frier, the trustee in his sequestration; a reduction of the bill, at the instance of the Kerrs, was conjoined with this process.

The defenders pleaded that the bill had been accepted by their deceased father only for the accommodation of Scoon, and that in respect of a series of statements and contradictions by Scoon, when called upon to explain the transactions out of which the bill arose, the presumption of its onerosity was overcome.

It appeared that there had been a great number of complicated bill transactions between the parties, and that Scoon, (who has recently been fugitated for non-appearance in the Court of Justiciary, to answer a charge of swindling), had given several different and inconsistent accounts of the origin and nature of the bill in question. These statements were contained in letters which were produced, in his record, and in his explanations at a meeting before an accountant, to whom a remit had been made in the cause. On the latter occasion he also produced a document, which there were good grounds to suspect was concocted. He was also proved to possess blank bill stamps with Hogg's signature. The parties had renounced probation.

Feb. 8. 1853. The Lord Ordinary, (Colonsay), in the ordinary action, assoilzied the defender.

Frier v. Hogg
or Kerr, &c.

The pursuer reclaimed,

For whom *Pattison* and *Penney*.

For the defenders, *Gifford*, and the *Lord Advocate*, (*Moncreiff*).

The LORD PRESIDENT. The party is clearly convicted of giving a false account of this bill. He makes contradictory statements, and then attempts to return to the first, and to support it by a document of a very suspicious nature, which he volunteers to produce before the accountant. All these circumstances and contradictory averments are sufficient to throw the onus upon the holder, to support his bill *aliunde*. He has already renounced probation, and stands upon a document about the history of which is in darkness.

Their Lordships concurred.

The COURT adhere.

James Somerville, S.S.C., Pursuer's Agent.

James Bell, S.S.C., Defenders' Agent.

(W. H. T.)

No. 111.

GORDON (MUNRO'S TRUSTEE), v. HOWDEN.

Interest, Rate of—Bona fides.—Circumstances in which a party, *bona fide* in possession, was found liable in interest at the rate of only four per cent.

1st Division.

Feb. 8. 1853.

Gordon v.
Howden.

The defender had been a dormant partner in a pawnbroking business with Munro, who was the only ostensible partner. Munro died insolvent, and a trustee was appointed. The trustee died, and the pursuer succeeded to the office of trustee.

The defender then came forward, and took an active charge of the estate, and after some litigation with the trustee, was in 1837, appointed by the Sheriff to wind up the affairs, to the exclusion of the trustee, and continued in possession in that character till Dec. 1838. In 1841, a reduction of the copartnery, founded on the provisions of the Pawnbroking Act, had been raised by the trustee, and it was afterwards carried on by the pursuer. On the 28th April 1845, the House of Lords, reversing the judgment of the Court of Session, reduced the contract of copartnery, and the whole estate was consequently held to have belonged to Munro.

On the case returning to the Court, an arrangement was entered into between the parties, by which it was agreed that a balance was to be held as due to the estate, by the defender, of £2,426, as at 24th Dec. 1838, but, *inter alia*, the question remained for the Court of what interest the defender was bound to pay to the pursuer on that sum, being the capital of the copartnery estate.

The Lord Ordinary (Robertson), found that the proper rate of interest was five per cent.

The defender reclaimed.

For whom appeared *J. S. More*, and *Dean of Faculty (Inglis)*

Shand, for the pursuer.

The LORD PRESIDENT. The question is, what rate of interest is due by the defender, after the 24th Dec. 1838? There can be no doubt that he, *bona fide*, thought himself a partner, and the Court of Session unanimously held that

he was so. He was put in the management of the estate in 1837, and remained in possession about a year and a half. That was only a reasonable time for winding up, and I therefore think, that up to that time, there is no question as to interest at all. After that, interest is due. The Lord Ordinary fixes it at five per cent; but the defender wishes to pay only three per cent. There being no evidence whether the funds were in the bank, or employed in trade, I think the fair market rate of interest, say four per cent., ought to be given. It was well shewn by Lord Mackenzie, in a former case, that legal interest does not necessarily mean the highest rate of legal interest.

The other Judges concurred, and an interlocutor awarding interest at four per cent. from Dec. 1838, was pronounced.

Shand and Farquhar, W.S., Pursuer's Agents.

Pollock and Stewart, W.S., Defender's Agents.

(W. H. T.)

BULLOCH v. BEATON.

No. 112.

Trust deed—Bequest—Free yearly annuity—Construction.—Held that the bequest of a free yearly annuity imports an annuity free of legacy duty, and of all deductions whatsoever, and that the construction of the word *free* does not depend on what may be supposed to have been the intention of the testator, unless the word appears to be qualified by other more limited expressions in the deed.

This was an advocacy from the Sheriff Court of Stirlingshire. The deceased, William Bulloch, late clerk in the Excise Office, Glasgow, by trust disposition and deed of settlement, provided and declared, *inter alia*, that his trustees should deliver over to Mary Ann Beaton the whole household furniture and plenishing which should belong to him at the time of his death, and which he thereby bequeathed to her, with a "free yearly annuity of £60 sterling," during all the days and years of her life, payable half-yearly at the usual terms of Whitsunday and Martinmas.

William Bulloch died in 1837; and John Bulloch, the present advocator, is now the only accepting and surviving trustee under the deed of settlement. Against John Bulloch as trustee, Mary Beaton brought an action in the Sheriff Court, on the allegation that the trustees, instead of paying over to her, as by the terms of the disposition and deed of settlement they were bound to do, the free yearly annuity of £60 sterling, had for four years, under the pretence of legacy-duty, unwarrantably and illegally deducted and retained from off each of the annual payments of £60, the sum of £24 sterling, which sum of £24 deducted from each of the foressaid annual payments of £60, amounts, *in cumulo*, to the sum of £96 sterling, in which sum the defender, as sole surviving and accepting trustee, is justly due and resting-owing to the pursuer; and, therefore, concluding for payment of that sum with interest and expenses.

To this action defences were lodged by the trustee, pleading, *inter alia*, that under the 36 Geo. III., c. 52; 45 Geo. III., c. 28, and 55 Geo. III., c. 184, a duty was payable on the sum of £940, 16s., being the value of the annuity provided to the pursuer, which, at the rate of ten per cent., she being a stranger to the deceased, amounted to £94 : 1 : 7. That this duty was payable by the annuitant, and not by the executor of the will, although the latter was bound to see to it being paid, and entitled to retain it from the annuity in four annual instalments: and that the duty having being paid and retained, and discharged

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granted by the annuitant, she is now barred from objecting to these discharges, *ope exceptionis*, and, therefore, the present petitory action is incompetent and untenable.

The Sheriff found, that under the terms of a free yearly annuity, the pursuer was entitled to the same without any deduction, and, therefore, found the defender liable in payment of the sum of £94 : 1 : 7, with legal interest from the date of citation to this action, until paid.

The defender advocated ; and the Lord Ordinary, (Rutherford), repelled the reasons of advocacy, and remitted the case *simpliciter* to the Sheriff. In the note appended to his interlocutor, his Lordship stated, that "the present question, according to all the authorities, depends upon the construction of the will in which the legacy is contained, and, more particularly, whether the testator, in bequeathing a 'free yearly annuity of £60 sterling,' intended to give that legacy free of legacy duty, or to impose the duty upon his executors, so that the legatee should take the whole sum without deduction. The parties did not refer the Lord Ordinary to any Scotch authorities on the point, but frequent cases have occurred in England, and it seems very reasonable in such circumstances to refer to the decision of English Courts. The rules of construction are the same. . . . The case has uniformly been put in the English Courts in this way:—that, *prima facie*, the law must take its course, and the legacy be left in the circumstances in which the law places it, unless the Court is satisfied that it was the testator's intention that the legacy should be paid free of legacy duty. There can be no doubt that such is the condition of the question, a question to be solved by the terms of the will, though not without reference to the circumstance that the testator must be held to have known that the legacy was subject to duty, and, also, that in the course of ordinary and safe administration, his executors should retain the duty. . . . The Lord Ordinary cannot put any meaning upon the words 'free yearly annuity,' except that it shall be free of deductions, and if legacy duty be a deduction, then of legacy duty. Nor can he distinguish between the words 'free yearly annuity' and 'clear yearly annuity.' Further, he thinks that the will in this instance affords quite as strong grounds as any of the other cases for giving the largest construction to the word *free*, the annuity being 'declared to be alimentary and of no large amount.' . . . His Lordship did not think that the receipts granted to the trustee barred the present demand. The action is not of the nature of '*condictio indebiti*,' it is for payment of a sum retained or not paid under a mistake in point of law. The pursuer makes no claim for the sums in the receipts ; she only claims for the sums which the receipts shew not to have been paid." The authorities referred to were *Barksdale*, 21st May 1818, Swanston's Reports, vol. i., p. 562 ; *Dawkins v. Tatham*, 21st February 1829, Simon's Reports, vol. ii., p. 492 ; *Gude v. Mumford*, Court of Exchequer, 10th February 1837, Young's and Collyer's Reports, vol. ii., p. 448 ; *Sanders v. Kiddell*, 24th November 1835, Simon's Reports, vol. vii., p. 536.

The advocator reclaimed.

E. S. Gordon for the reclamer.

Maitland for the respondent.

The LORD JUSTICE CLERK. I adhere to the interlocutor of the Lord Ordinary. This is a bequest of a free yearly annuity. Now the word *free* imports of itself that the sum is to be free of all charges. It is a short and elliptical expression for the other more general expression, "free of all deductions whatsoever,"—free of every thing which would diminish the annuity below the specified sum of £60. I am not inclined to make the case turn in any degree on the question stated in the note of the Lord Ordinary as to the intention of the testator. If there are terms in a will which bestow on a legatee a right to get a sum of money free of all deduction of every kind, then, before you can burden this sum of money with any deduction, you must shew that this more generous expression is contradicted by other and more limited expressions in the will. Here there is nothing whatever to indicate that this term was not used in its natural and proper legal sense. Accordingly, it is of no consequence, in my view of it, whether the testator had this deduction of legacy duty in view or not. I do not in the least, therefore, enter into any speculation on this subject. When you are to pay a free yearly annuity, it must be held to be free of this sum which by law would be a burden on it. There are rules settled in England in regard to cases of this kind. I think we ought to adhere to the decisions come to in that country where they have so many more cases than we have, unless it could be clearly shewn that they were wrong: and applying these rules, I think that the decision of the Lord Ordinary is right.

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LORD COCKBURN. I am of the same opinion. I have no authority for inquiring what the intention of this testator was, except the words he has used, and there is only one expression applicable to this annuity. It is directed to be *free*. Now, what construction can we give to this, except that it is to be free from every thing. The other construction consists in extinguishing the word *free* from the deed. I cannot strike the word free out of that deed. As to the second point, it is quite untenable.

LORD MURRAY was of same opinion.

LORD WOOD. A *free* annuity is nothing else than an annuity free of all deduction whatever. These words are not stronger than the word *free* by itself. The speculation as to the testator's intention is excluded, unless it can be found in other parts of the deed that this expression is contradicted, and that the testator did not intend to give an annuity free of all deductions.

The COURT, therefore, "refuse the reclaiming note, and adhere to the interlocutor reclaimed against: Find the reclaimer liable in additional expenses," &c.

Thomas Sprot, W.S., Reclaimer's Agent.

David Crawford, S.S.C., Respondent's Agent.

(J. S. M.)

FORREST v. CAMPBELL.

No. 113.

Reclaiming Note.—Act 11 and 12 Vict. c. 86.—The original condescendence appended to the summons need not be printed with the reclaiming note.

1st Division.

J. Lorimer, for the respondent, objected to the competency of this reclaiming note, on the ground that the reclaimer had printed only the revised condescendence, and not the original condescendence appended to the summons.

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Wood, for the reclaimer. In the case of *Haggart*, 20th July 1852, the objection that the defences were not printed, had been repelled.

The COURT dismissed the objection, holding that it was unnecessary to print the first condescendence.

A. Clark, W.S., Agent for Reclaimer.

Jopp and Johnston, W.S., Agents for Respondent. (W. H. T.)

No. 114.

SIR J. COLQUHOUN v. THE LOCHLOMOND STEAMBOAT COMPANY.

Interdict—Possession.—The proprietor of the banks of a river applied for interdict to prevent steamers from entering it, on the ground that they injured his banks. The owners of the steamers having recently obtained an interdict against attempts on his part to obstruct their so navigating the river, interim interdict was refused to him, in respect that the *prima facie* right was decided against him in the other process.

1st Division.

Feb. 11. 1858.
Colquhoun v.
Lochlomond
Steamboat Co.

This was a note of suspension and interdict at the instance of Sir James Colquhoun of Luss, against the Lochlomond Steamboat Company, to have them interdicted from entering the river Falloch with steamers, so as to injure the banks, and in particular, from canting or turning their steamers at the confluence of the burn of Garabal with that river, or at any other point where the banks might be displaced by contact with the vessels. This injury, the complainer stated, took place to a great extent, as the river was too narrow to be navigated by steamers.

It appeared that the respondents had, some months before, obtained an interdict against the complainer, to prevent him from continuing to put piles and stones into the river at a point where they were then in the habit of turning, a little lower than that to which they were now, in consequence of the operations of the complainer, obliged to resort. No difference between the two places, in regard to his right on the one hand, or the injury done on the other, was alleged by the complainer.

The Lord Ordinary on the bills passed the note, but refused in the meantime to grant the interdict.

The complainer reclaimed.

For whom appeared *Patton, Neaves*, and the *Dean of Faculty (Inglist)*.

For the respondents, *Deas* and *Currie*.

The COURT, without hearing the respondents, adhered. It was observed, that the question of possession had been inverted by the complainer. He had been found in the other process of interdict, to be a wrong-doer, and invader of the rights of others. He could not therefore expect interdict to be granted at present. He might possibly obtain it afterwards, if, on a remit being made, great injury to his property should be reported.

Tawse & Bonar, W.S., Complainer's Agents.

Davidson & Syme, W.S., Respondents' Agents. (W. H. T.)

MOIR v. DOUGHTIE.

No. 115.

Suspension—Decree in absence—Act 1 and 2 Vict. c. 86, sect. 5—Act of Sederunt 24th December 1838.—Suspension of a decree in absence must proceed upon a record made up, by reasons of suspensions and answers, and the passed note does not reponne the suspender at once in the original action.

This was a suspension of a charge proceeding upon an extracted decree in 1st Division. absence. The prayer of the note of suspension was "*simpliciter* to suspend Feb. 12. 1853. the said decree in absence, and charge, and whole grounds and warrants thereof, and to reponne the complainer against the same," &c.

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Doughtie.

The note having been passed, the suspender moved to be reponed.

The charger objected, that the record must be made up in the suspension.

The Lord Ordinary (Rutherford), reported the case, upon this point, to the Second Division. The Second Division, "on the report of Lord Rutherford, and having regard to the decision of the First Division in the case of the *Edinburgh, Dundee, and Perth Railway Co. v. Rowan and Co.*, 13th July 1852," remitted the note of suspension to the First Division.

Ogilvie, for the suspender, in support of the motion to be reponed, contended that such was the effect of the Act 1 and 2 Vict. c. 86, sect. 5. And that such was the interpretation of it by the Court, was obvious from the Act of Sederunt, 24th December 1838, and schedule appended thereto, of note of suspension in such cases, containing prayer to reponne—*M^r Phun v. Marshall*, 20th January 1842; *Downie v. Peebles*, 27th November 1841—showing the practice since the Act. See also the old practice as laid down in Beveridge's Form of Process, p. 78. It had the great convenience also of retaining the pursuer and defender in their proper mutual position.

Adam, for the respondent, founded on the case of *Rowan*, alluded to in the remit. In that case, no doubt, diligence had been done, which was not the case here, but that made no difference in the principle. Lord Rutherford's doubts arose chiefly from the supposed case of a decree of absolvitor; but there could not be an absolvitor in absence. Looking to the words of the 5th section of the Act, it was plain that the only effect which could follow the passing of the note, was a suspension of the diligence, not a reponing, for it was an absurdity to petition in one process to be reponed in another. The words "grant warrant to transmit the original proceeding to the clerk in such cause," were conclusive of what was meant; the original process was ended by the extracting of the decree, and the proceedings were to be transmitted in the character of a production. See *Ewing v. Cheap*, 24th February 1825, in reference to the practice before the passing of the Act. Should there be a relevant plea against the suspension, the respondent was entitled to put it in record, which implied that they had not got into the original action. *Corrie v. Anderson*, 12th July 1842.

The LORD PRESIDENT. The fifth section of the Act is not clearly expressed. But we can gather that it relates solely to a proper decree in absence; that is, where the defender has not entered appearance, in contradistinction to a decree by default. It cannot therefore apply to the case of a

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pursuer. This gets rid of the Lord Ordinary's difficulty. No distinction is made in the Act, between cases in which diligence has been done, and others. "The cause," in the words of the Act, evidently means the note of suspension: It afterwards speaks of "calling the cause," which cannot mean the original cause. The record must be made up on the reasons of suspension, and if these are repelled, the decree stands as before. I therefore adhere to the judgment in the case of *Rowan*.

LORD FULLERTON. It is quite clear that the object of the fifth section is to assimilate the procedure to suspensions of Inferior Court decrees. The word "cause," is not intelligible, unless it applies to the process of suspension.

LORD CUNINGHAME concurred.

LORD IVORY. I am more and more confirmed in the opinion given effect to in the case of *Rowan*. The statutory object is the process of suspension, and it is the only "cause" to which it applies. *Absence* alone does not necessarily imply being reponed. Homologation, for example, may bar the party from that advantage. This consideration alone is sufficient to settle the question. The original process may revive, but not in the manner here proposed. The process of suspension may be longer or shorter, but it must be *within itself*, and it is only after clearing the ground with it, that the other process can be entered upon.

The following interlocutor was pronounced. "Find that the same course of procedure which was adopted in the case of 'the *Edinburgh, Perth, and Dundee Railway Company v. Rowan*,' 13th July 1852, is applicable to the present case; Therefore remit to the Lord Ordinary to make up the record by reasons of suspension, and answers thereto, and to proceed farther as shall be just."

G. Smith, S.S.C., Suspenders Agent.

W. Hunt, W.S., Respondent's Agent.

(W. H. T.)

No. 116.

PETITION AND COMPLAINT, KIDD v. YOUNG AND OTHERS.

Election of magistrates of burgh—16 Geo. II., c. 11, sec. 24.—A petition and complaint to have an election of magistrates set aside was boxed on the 12th November, being three days within the statutory two months, but did not appear in the single bills till the 16th, being one day after the expiry of that period. Two box days had intervened between the election and the lodging of the petition:—*Held* that the petition was presented too late.

1st Division.

This was a petition and complaint under the 7th Geo. II. c. 16, and the Feb. 12. 1858. 16th Geo. II., c. 11, for the purpose of setting aside the election of magistrates for the burgh of Anstruther-Wester.

Kidd v. Young,
&c.

Macfarlane, for the respondents, objected, that the complaint had not been presented within the period required by the latter of the statutes above mentioned, which declares (sec. 24) that such applications shall be competent, "so as such complaint be presented to the said Court of Session within two calendar months after the annual election of the magistrates and councillors." In the present case, it was stated, the election took place on the 15th September, but the interlocutor ordering service was dated the 16th November, being the day on which the petition was presented to the Court, and consequently too late. *Henderson v. Lang*, 3d July 1821, 1 S. 99.

P. Fraser, for the complainers, answered that the petition had been lodged on the 12th November, and might have appeared in the single bills earlier than the 16th. The delay was, therefore, not the fault of the complainers. *Kidd v. Young, Connel on Election Law*, p. 373; *Douglas*, 24th June 1829, F. C. Feb. 12. 1853.
Kidd v. Young,
&c.

Replied that the risk might have been obviated by lodging the complaint on either of the two box days which intervened between the election and the meeting of the Court. *Spiers v. Buchanan*, 25th January 1823.

The Court sustained the objection.

Jardine, Stodart, and Fraser, W.S., Complainer's Agents.
T. and R. Landale, S.S.C., Respondents' Agents. (W. H. T.)

COUPAR and OTHERS v. STEELE.

No. 117.

Entail—Succession—Heirs whatsoever—Assignees.—Where an entail was executed in favour of a certain series of heirs, "whom failing, to my own nearest lawful heirs and assignees whatsoever, the eldest heir-female excluding heirs portioners," &c.,—*Held*, That the word assignees covered the assignees of heirs whatsoever, as well as the assignees of the entailor, and that when this clause came into operation that the entail was at an end.

This was an action of declarator at the instance of the trustee on the sequestrated estate of the deceased Alexander Coupar, sometime shoemaker in St Andrews, thereafter residing in Forfar, and was brought for the purpose of having it declared, that certain property to which Coupar had succeeded in virtue of an entail, is subject to his debts, deeds, and obligations, and that therefore the trustee on his sequestrated estate is entitled to sell and dispose of it. By this disposition and deed of entail, the late Alexander Coupar, wright and carpenter in St Andrews, "gave, granted, and disposed, to and in favour of himself, and the heirs male or female that might be lawfully procreated of my body, whom failing, to Alexander Coupar, junior, son of Alexander Coupar, shoemaker in St Andrews, my nephew, and the heirs male of the body of the said Alexander Coupar, junior, whom failing, to the heirs male of the body of the said Alexander Coupar, my nephew, whom failing, to David Coupar, shoemaker in St Andrews, my nephew, and the heirs male of his body, whom failing, to my own nearest lawful heirs and assignees whatsoever, the eldest heir female excluding heirs portioners, and succeeding always without division throughout the whole female course of succession." 1st Division.
Feb. 15. 1853.
Coupar, &c., v.
Steele.

Alexander Coupar, the granter of the entail, died in March 1838 without issue of his body. Alexander Coupar, junior, his grand-nephew, the first substitute therein mentioned, after having completed his title as heir of entail died a bankrupt in August 1850 without issue of his body. He was predeceased by his father, Alexander Coupar, senior, the second *nominatim* substitute, who had no male issue besides the bankrupt, and also by David Coupar the third *nominatim* substitute, who died without male issue. The pursuer, therefore, pleaded, that Alexander Coupar, the bankrupt, having been the last heir of entail under the deed of entail, and having died without issue, his right was not subject to any of the conditions or fetters of the entail; and the property was therefore liable for his debts.

The defenders are the sisters german, and nearest and lawful heirs of Alexander Coupar, junior, the bankrupt, and also the nearest and lawful heirs of the

Feb. 15. 1853. entail. They pleaded that Alexander Coupar had no right to the lands in question, except under the fetters of a strict entail, and that the defender, Coupar, &c., v. Isobel Coupar, is entitled to succeed as heiress of entail to the lands in question, without division, in virtue of the destination contained in the deed of entail, heirs portioners being excluded.

The Lord Ordinary, (Rutherford), repelled the defences, and declared against the defenders in terms of the libel, and he added a note, in which he stated that "he could have no doubt in this case had it stood upon the elder authorities; but the recent decision of *Gordon v. Mosse*, 19th December 1851, rules the present, and he need not repeat here the grounds of that judgment, in which he entirely concurs, and of which the application is obvious. The distinction founded on the expression which *here occurred*, his own nearest lawful heirs whatsoever, and *their* assignees—the word 'their,' not occurring in this instance, seems quite insufficient to support the defences. The effect of the word 'assignees,' cannot be limited to the assignees of the entail, and for the purpose of enforcing fetters."

Against this interlocutor, the defenders reclaimed.

N. C. Campbell, and *G. G. Bell*, for the reclaimers, referred to *Gordon v. Mosse*, *supra*; *Leslie*, M. 15,358, 1710; *Hendrie v. Watt*, 10 S. 644, 18th June 1832; *Farquar*, 1 D. B. M. 121, 29th Nov. 1838; *Craig v. M'Culloch*, 1 D. B. M. 545, 21st Feb. 1839; *Stirling v. Drummond and Others*, 25th May 1845, 7 D. B. M. 651.

Patton was for the respondent.

THE LORD PRESIDENT. I think that the construction of the Lord Ordinary is the right one. The broad question here is in reference to the concluding destination, "whom failing, to my own nearest lawful heirs and assignees whatsoever, &c." Now I think, that although there is room for some distinction between this case and the case of *Gordon*, yet I think the word *assignees* does cover the assignees of heirs whatsoever, as well as the assignees of the entail; and when you put it in that position, that is the termination of the entail. That is the principle of the decisions in the various cases referred to. No doubt there is another matter referred to in these cases, viz., that where there is no exclusion of heirs-female that will indicate the termination of the entail. But while the presence of heirs portioners indicates the absence of an entail, the absence of heirs portioners does not necessarily indicate the presence of an entail. I think there is no real distinction between this case and the case of *Gordon*.

LORD FULLERTON. I agree, and I think it is fortunate that a case of this kind has occurred, for it enables the Court to settle finally what has been settled speculatively before. I think the general principle is quite clear here, that when a party making an entail executes a disposition of land to a certain series of heirs, and then concludes with the provision, "whom failing, to my nearest lawful heirs and assignees whatsoever," the principle is, that the entail is at an end when that provision comes into operation. If that be the case, and I think it is a sound and safe view, it is quite impossible to hold that an entail can be set up merely by the insertion of an exclusion of heirs portioners. It is clear that the entail is at an end. It would be most extraordinary if

it were not so, for it might extend to assignees as well as to heirs whatsoever. Feb. 15. 1853.
I hold by the old rule that this terminating clause is intended for a different purpose than renewing the entail.

Coupar, &c., v.
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LORD CUNINGHAME. On the merits of the question under review, I should not have any doubt of it, if the destination had occurred in a settlement of a landed estate of the highest value. It is ruled by the decision in the case of *Mosse*. No doubt in the title there, the devolution was to "heirs whatsoever of the granter, and *their* assignees," with an exclusion of heirs portioners, while here it is to "heirs whatsoever and assignees," i.e., the eldest heir portioner may assign, just as all the heirs portioners, if they had not been excluded, might have assigned. In either way the entail is destroyed on the failure of the penult substitute. The possibility of that result extinguishes the entail, just as much as the susceptibility of division by two or more heirs portioners when they are not excluded. And according to the decision of the well known case of *Calzean*, the last special substitute in the destination has right to dispose of the estate as in fee-simple.

LORD IVORY concurred.

The COURT "Refuse the prayer of the reclaiming note, and adhere to the interlocutor of the Lord Ordinary reclaimed against: Find the pursuer entitled to additional expenses," &c.

Graham and Webster, W.S., Agents for the Pursuers.

George Smith, S.S.C., Agent for Defender.

(J. S. M.)

LAWSON v. JOPP.

No. 118.

Imprisonment—Small Debt Imprisonment Act, 5 and 6 Will. IV. c. 70—Salmon Fishing Act, 9 Geo. IV. c. 39.—Imprisonment for offences against the Salmon Fishing Act, though in respect of a fine under L.8 : 6 : 8, is not illegal under the Small Debt Imprisonment Act.

Jopp, who is clerk to the proprietors of salmon fishings on the Dee, presented a petition and complaint to the Sheriff, under the Act 9 Geo. IV. c. 39, sec. 8 and 9, against Lawson, for having a boat, &c., at the fishing-place in close time. Evidence being led, the Sheriff pronounced an interlocutor, finding the complaint proven, and that the defender had incurred the penalty provided by section 8 of the statute; modifying the same to L.2, with L.4, 13s. 6d. of expenses of process, besides dues of extract; "and failing payment of the said penalty and expenses within fourteen days from this date, grants warrant, in terms of section 9th of said statute, for the recovery thereof by poinding and imprisonment in the prison of Stonehaven, hereby limiting the period of imprisonment to the space of one calendar month from the date of commitment."

Lawson appealed from this interlocutor to the Circuit Court of Justiciary at the Aberdeen circuit, and it was certified to the Court of Session.

John Lorimer, and *Moir*, for the appellant, contended that the penalty being only between L.6 and L.7, imprisonment for it was illegal, under the Small Debt Imprisonment Act, 5 and 6 Will. IV. c. 70, which enacts, that "it shall not be lawful to imprison any person or persons on account of any civil debt, which shall not exceed the sum of L.8 : 6 : 8 sterling, exclusive of interest and expense thereon."

Feb. 16. 1858. *Lawson v. Jopp.* By the 9th section of the Salmon Fishing Act, under which the complaint had been laid, the imprisonment was not for punishment but for the recovery of the penalty. That penalty was a *civil* debt. There were two kinds of penalties; a penalty for a *malum in se* was a *criminal* debt, but when merely for a *malum prohibitum* it was *civil* debt, like any other; *M'Donald v. Grey*, 17th Feb. 1844, II. Brown, 107; *Philips*, ix. D. 318; *Robertson v. Magistrates of Aberdeen*, 16th Feb. 1837. The offence in the present case was certainly not a *malum in se*, it was not even poaching, but merely neglecting to remove a boat in close time. The penalty being therefore merely a *civil* debt, came clearly under the Small Debt Imprisonment Act. No doubt, certain exceptions were there made; (sec. 5) "Nothing in this Act shall affect obligations *ad facta præstanda*, or the right of his Majesty or his officers, or the fiscals of Courts of law, or others, to imprison as formerly on account of taxes or penalties due to the revenue, or on account of any fines or forfeitures imposed, or hereafter to be imposed, by law," &c. All these exceptions were plainly things partaking of a criminal nature, or at least were penalties exacted at the instance of the Crown, either directly or substantially. Here the Crown had no interest; the respondent sued under the statute, and the penalty went to the informer. At all events, the expenses of process, which constituted the larger part of the sum, were only a *civil* debt.

Miller, for the respondent, maintained, that this and all similar penalties evidently fell under the exceptions in the Small Debt Imprisonment Act. If imprisonment for such were incompetent, the penalties under this and innumerable other statutes could never be recovered at all.

The LORD PRESIDENT. The question relates to the whole scope of the Act 5 and 6 Will. IV., c. 70. The words "on account of any civil debt" plainly are intended to exclude pecuniary mulcts, or fines inflicted by way of punishment, fines *in modum pænæ*. The word "civil" is taxative, the use of it implying that there may be other sums under £8 : 6 : 8, which may in a sense be called debts, but cannot properly be called civil debts. The exception of debts due under contracts made before the passing of the Act, in regard to which imprisonment is permitted within four years after it comes into play, affords a strong indication of the class of debts to which it is intended to apply. The statute is no doubt remedial, and as such, entitled to a liberal construction, but not so as to embrace matters different in kind. The evil to be remedied is set forth in the preamble, which refers to a report by commissioners, by which it appears that great hardships were suffered by poor persons in consequence of imprisonment for civil debts of small amount, "and whereas it is expedient that a remedy be provided," &c. I consider it quite competent to look to that report, in order to solve any doubts which may exist as to the class of debts intended. I there find no mention whatever of fines *in modum pænæ*; on the contrary, it gives the statistics of the debts which it refers to as civil debts, and classifies them in such a manner as to exclude all fines for delinquencies. Imprisonment for the latter can endure only a limited time, while that for proper civil debts may depend on the obstinacy or malevolence of a creditor. The second section also throws some light; it mentions debts

in virtue of "letters of caption, act of warding, decree of small debt Court, Feb. 16. 18'3. or other warrant," all plainly applicable to civil debts alone.

From this analysis, I think it tolerably clear that fines for crimes properly ^{Lawson v. Jopp.} so called, are not included in the statute. But there is an intermediate class of penalties for acts which are prohibited by law, though not properly criminal, or at least not of a very heinous nature, about which there might have been some doubt. This doubt the 5th section is intended to set at rest. The only remaining question is, to which of the three classes the present case belongs. It is certainly not a debt arising from any contract, or civil transaction, or obligation, in the ordinary course of business. Neither is it an award for reparation or damages on account of injury. It is a fine, forfeiture, or penalty imposed by law for the contravention of a public act passed on grounds of public expediency for the preservation of the breed of salmon, which has long been regarded as of public importance to Scotland. The thing done was a *malum prohibitum* only, but still a *malum* which draws after it a fine with summary imprisonment in the event of non-payment; plainly a penalty or punishment for the transgression. It is said to be different from a criminal prosecution, in so far as it is recoverable by any person prosecuting, instead of the public prosecutor. But, valuable as is our institution of a public prosecutor in Scotland, it is still competent for the private party, with his concurrence, to prosecute in his own name; and though we have no *actio popularis* at common law, yet the omnipotence of statute may create it in particular cases, as in the present. The *instance*, therefore, in this class of cases seems to me to distinguish it much more from *civil* debts than from criminal fines. It is not a creditor who prosecutes; he cannot discharge it without prosecution; it cannot be insisted in against the defender's heirs; it cannot be recovered in the same manner as civil debts. It is said that the imprisonment is not part of the punishment, but only the machinery by which it is to be recovered, but I cannot attach much weight to this view. Both are parts of the punishment and *in arbitrio* of the judge. The only case alluded to which I think necessary to advert to, is that of *Robertson*, 16th February 1837. It was there found that a prisoner under this very Fishery Act was entitled to aliment. But it does not follow that the scope of the Act abolishing imprisonments for small debts is co-extensive with the Act 1696. The evil to be remedied was not the same in the two statutes.

Finally, I do not see any reason for drawing a distinction between the original fine and the expenses. Both are statutory consequences of the transgression.

The other Judges concurred.

The Court therefore, "dismiss the appeal."

Jopp, and Johnstone, W.S., Appellant's Agents.

J. Mason, S.S.C., Respondent's Agent.

(W. H. T.)

HAY v. JACK and OTHERS.

No. 119.

Parochial relief—Act 8 and 9 Vict., c. 83—Notice—Mora—Expenses.—1st, A parish gave interim aliment to a pauper for seven years, before the statutory notice was given to the parish ultimately found liable, the new Act requiring the notice having been passed two

years after the aliment commenced :—*Held*, That there was *mora* during the whole period, and that no repetition was due of sums paid before the notice. 2d, A parish sued three others alternatively, concluding that one or other was liable :—*Held*, That the unsuccessful defender was not liable in relief to the pursuer, of the expenses of the two who were assoltized.

2d Division.

Feb. 16. 1853. *Edinburgh* in 1842, and in April 1843, began to receive parochial relief from the City parish, which was continued to August 1850. The inspector for the parish of Edinburgh, the pursuer, applied for relief of their advances, to the parish of Ayr, on the ground of its being the settlement of both, and residence of the pauper's late husband. Ayr refused, and referred the pursuer to the parish of St Cuthberts, where, they alleged, the husband had acquired an industrial settlement after leaving Ayr in 1825. St Cuthberts, in their turn, referred to the parish of Dundee, on the ground of residence there for three years previous to 1839. Some communications had been made by the pursuer's predecessor to that parish in 1843, but they ended in nothing, and the statutory notice of the claim was not given till the 19th February 1850. The inspector for Dundee denied the alleged residence, and the pursuer then raised the present action against all the three parishes, concluding for relief against one or other of them.

Hay v. Jack,
&c.

The defenders pleaded as above mentioned, and the parish of Dundee, in addition to the general denial of residence, maintained the plea of *mora*, and that even if residence should be proved, they were liable for relief only since the date of the notice sent by the pursuer. The pursuer replied, that the relief having begun before the passing of the present poor law no notice was required.

A proof having been taken, the Lord Ordinary, (Cowan), found the requisite residence in Dundee proved, and the parish liable for the whole sum claimed; repelling the defences of *mora*, and of want of notice; assoltized the other defenders, and found them entitled to expenses. Found the parish of Dundee liable in expenses to the pursuer, and in relief of the expenses found due to the other defenders, subject to modification.

The parish of Dundee reclaimed, for whom *Moir*, who confined his argument to the pleas of *mora* and want of notice, and to the question of the expenses found due to the other defenders. *Hay v. Knox*, 20th June 1850.

A. R. Clark, and *T. Mackenzie*, for the pursuer; *Mure* for the parish of Ayr; and *Donaldson* for St Cuthberts.

THE LORD JUSTICE-CLERK. There seems to me to have been no notice given before February 1850. There was therefore *mora* from 1843 downwards, which saves all questions of the difference of position before and after the Act of 1845. The pursuer is not entitled to accumulate arrears and then come upon the defender, who knows nothing of the matter. It is a hardship to the rate payers of one year to make them liable for the paupers of so many former years. As to the expenses, the pursuer might have thrown the burden of investigation on the parish of Ayr, but did not do so, and I cannot see that we are going against any general rule in finding that the parish of Dundee is not liable for the expenses of the other defenders.

Their Lordships concurred, Lord Murray expressing some doubts on the question of expenses.

The COURT "alter the interlocutor in so far as it sustains the claim of re- Feb. 16. 1853.
 lief at the instance of the parish of Edinburgh, from the year 1843; find that Hay v. Jack,
 in the circumstances of the case, the claim of relief cannot be carried further &c.
 back than the 19th day of February 1850; therefore, recall the decerniture
 in the interlocutor for the full sum claimed; *quoad ultra*, adhere, and, of new,
 find and declare in terms of the conclusions of the libel, from and after the
 said 19th day of July 1850, and, of new, decern against the reclaimer for the
 sum of £2 : 5 : 5, with interest from the 1st day of August 1850; and, farther,
 alter the interlocutor so far as it finds that the reclaimer, Henry Jack, as in-
 spector of the poor of the parish of Dundee, must free and relieve the pur-
 suer of the expenses, or any part thereof, found due by him to the inspectors
 for the parishes of Ayr and St Cuthberts, but, of new, find the said Henry
 Jack liable in expenses to the pursuer up to the date of the Lord Ordinary's
 interlocutor, inclusive, under modification."

J. Morgan, S.S.C., Agent for Pursuer.

J. R. Stodart, W.S., Agent for St Cuthberts.

Patrick, M'Ewen, and Carment, Agents for Ayr.

J. Murdoch, W.S., Agent for Dundee.

(W. H. T.)

THE CALEDONIAN RAILWAY COMPANY v. OGILVY.

No. 120.

8 Vict. c. 19—*Lands Clauses Act, &c.*—*Damages—Amenity—Level Crossing—Verdict of Jury—Reduction.*—A railway company was empowered to cross certain roads on the level. The proprietor of lands through which the railway passed, and two portions of which lands were connected by a statute labour road which the railway crossed on the level near the approach to the dwelling-house, claimed damages against the railway company for injury to the place as a residence and deterioration to the amenity. This claim went to a jury, who sustained it. A reduction of this verdict was brought by the railway company on the ground that it was *ultra vires* of the jury to award damage on account of a level crossing of a parish road:—*Held*, that the railway statute providing for damage "injuriously affecting" lands, included damage such as that claimed, and that the proprietor having satisfied the jury that damage had been sustained by him, their verdict was not reducible.

This was a reduction of the verdict of a jury, and judgment of the Sheriff 1st Division following thereon, pronounced in July last, in a trial between the railway Feb. 17. 1853.
 company and the defender. The ground of the reduction—which was brought
 by the railway company—mainly was, that it was *ultra vires* of the jury to Caledonian
 award compensation for a level crossing on a statute labour road connecting Rail. Co. v.
 two portions of the defender's estate, and forming the approach to the de- Ogilvy.
 fender's residence.

The Caledonian Railway passes through a small portion of the defender's estate. The powers for constructing the railway were conferred upon the usual condition of satisfying the claims of proprietors, for the value of land taken, and damage done to their properties, in terms of the provisions of the Lands Clauses Consolidation (Scotland) Act, 1845, which was held as incorporated with the special Act, constituting and empowering the railway company. The railway company were also authorised to cross certain roads on the surface, and amongst others the statute labour road in question. The most important enactments bearing in the present case, were as follows:—

By the 61st section of the 8th Victoria, cap. 19, it is enacted that in estimating the purchase-money to be paid by the promoters of the undertaking,

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regard shall be had not only to the value of the land to be taken, but also to the "damage, if any, to be sustained by the owner of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands, by the exercise of the powers of the Special Act." By the 48th section of the same Act, which regulates the proceedings before the jury, and their duty upon the inquiry, it is enacted "That the jury shall deliver their verdict by a majority of their number, separately for the sum of money to be paid for the purchase of the lands required for the works, or of any interest therein belonging to the party with whom the question of disputed compensation shall have arisen, or which, under the provisions herein contained, such party is entitled to sell or convey, and for the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands, by reason of severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands, by the exercise of the powers of this or the Special Act, or any Act incorporated therewith."

The usual statutory notices having been given by the company to the defender, with a view to acquiring the portion of ground belonging to him necessary for the formation of the line, and to an ascertainment of the value of the ground, so to be taken, and the damages done by the construction of the railway thereon, the defender made a claim of £2716, 15s. against the company, in which, among other items, he claimed "for very material injury done to the place as a *residence*, and deterioration to the amenity, and value of the house and policy by the railway crossing the approach to the lodge, and gate on the *level*, immediately in front of and within a few yards of the gate, whereby the free and open communication with the high road at a very short distance, is cut off, and all access prevented without a constant liability to very great inconvenience, interruption and delay," &c. The pursuers refused to admit this claim; and after a reference to arbiters, which became abortive, a claim was made by the defender upon the company, intimating that the compensation claimed by him, amounted to £2500, and in the event of the company declining to pay that sum, demanding that the case should be brought before a jury. A counter notice was served upon the defender making an offer of £850, in full of his claim, which was refused. The claim was accordingly sent to a jury in July last, and a verdict returned for the defender, finding, *inter alia*, "for severance and level crossing of the parish road, the sum of £560 sterling," and thereafter the Sheriff's judgment was pronounced, approving of the verdict, and decerning in terms thereof, "and in respect, the sum awarded by the jury exceeds in amount the sum tendered by the railway company, finds the claimant, Mr Ogilvy, entitled "to expenses in terms of the Act," &c. No objection was taken by the railway company at the trial, that it was *ultra vires* of the Court to entertain the claim, nor was any protest tendered by them against the Sheriff following up the verdict, by pronouncing judgment in terms of it.

The railway company now pleaded that in so far as the jury found the defender entitled to damages on account of the level crossing of the parish road, the verdict was *ultra vires*, inept, and null. They had no power under the Act of Parliament under which the inquiry took place, to give damages on any such ground, and therefore the verdict is reducible, and ought to be set aside.

The defender pleaded that this action of reduction is incompetent. There is ^{Feb. 17. 1853.} no provision in the Acts for a review of a verdict and judgment of the Sheriff following thereon, which are final and conclusive as in criminal matters, and ^{Caledonian Rail. Co. v. Ogilvy.} cannot be set aside. He also pleaded that the review of the proceedings before the Sheriff Court, in cases of compensation for injury done to property, is excluded by statute; and he founded upon homologation by the company, and their having taken no exception at the trial, and also upon the incompetency of reducing the verdict in part.

The Lord Ordinary (Wood), sustained the defences, and assoilzied the defender from the conclusions of the action, and found the pursuer liable in expenses; and his Lordship stated in a note appended to his interlocutor as the ground of his judgment, that "although the circumstances of this case may not be identical with those of the *Scottish Central Railway Company v. the Patron and Master of Cowan's Hospital, Stirling*, 12th June 1850, 12 D. 999, the Lord Ordinary is unable to see that there is any such difference as would warrant the rejection *here*, of the principle which was *there* recognised, and adopted by the Court in the judgment which they pronounced."

Against this interlocutor the railway company reclaimed.

Patton, and the *Dean of Faculty*, for the reclaimers, referred to *Queen v. Eastern Counties Railway*, 2 Adolph. and Ellis, New Q.B. Reports, p. 347; *the King v. Bristol Dock Company*, 12 East. p. 428; *the King v. London Dock Company*, 5 Adolph. and Ellis, Old Series, p. 165; *London, and North Western Railway Company*, May 1844, 5 Railway Cases, 716; *East and West India Dock Company v. Gentley*, 6 Railway Cases, 371.

Sandford, and *Deas*, for the respondent. The question is, what is the meaning of the words "injuriously affected," under sec. 61 of Lands Clauses Act. *Staffordshire Railway Company v. Hall*, 6 Railway Cases, 689; 8 and 9 Vict. c. 33, sec. 2 and 6.

LORD FULLERTON. It seems to me that the interlocutor of the Lord Ordinary is right. I can see no distinction between this case and the case of *Cowan's Hospital*, except in one matter, which is rather favourable to the defender in the present case. Here the defender has convinced the jury that his lands have sustained injury by the level crossing,—a point which, in the case of *Cowan's Hospital*, rested merely on the pursuer's averment, and the expected result of the proof. In both cases, the point of law is the same, viz., whether the clauses of the statutes do cover that particular ground of damage, which was the same in both cases,—that created by the level-crossing, which, though not in either case actually touching the property of the party complaining, was still in such close vicinity as materially to affect most injuriously the property of that party. Now I really can see no good reason for doubting that these clauses are broad enough to include that damage. Take for instance, secs. 61 and 48 of 8 Vict. c. 19. The jury have found that the level-crossing does injuriously affect the other lands of the owners, and that finding seems quite borne out by the evidence. Upon this point I confess I did not understand the distinction taken by the counsel for the pursuer. He admitted that these parties were bound to make good, first, the value of the lands actually taken, and, secondly, the damage arising from the other lands being

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injuriously affected by the level-crossing; but, as I understood it, he denied that the depreciation of those lands, created by the level-crossing, was an "injurious effect," according to the proper construction of the statute, and contended that that was limited to some physical injury done to the remaining property, as, for instance, the shutting up lights, or the actual destruction of some part of the premises. In regard to the English Cases, to which reference was made in support of this distinction, I must confess my inability to comprehend them. They rest on distinctions in English practice, of which we know nothing, and from which we can draw no conclusions in construing the words of a statute. How can it be doubted that lands are injuriously affected by an operation which most materially diminishes their value. In the conclusion contended for, on the part of the pursuers, it seems to be assumed that the ground of a claim of damages is not the injury sustained by the proprietor, but the supposed suffering of the lands themselves from the physical interference with their form and substance. This does appear to me to be a most preposterous view, and, accordingly, is one which is utterly unwarranted by the terms of the statute; according to them the compensation is to be given, not for any physical injury to the remaining lands, but for the damage *to be sustained by the owner*, by reason of severing of the lands taken from the other lands of the owner, or injuriously affecting such lands by the exercise of the power of the statute, &c. Now, what is the injury sustained by the owner from severance, but the diminution of the value of the remaining lands, in consequence of their total separation from the lands with which they were previously connected; and if a level-crossing does most materially endanger the facilities of access, that is evidently an injurious effect, to a certain extent, of precisely the same kind as that arising from severance, and must be dealt with on the same principle. If in one case, as well as the other, the remaining lands are diminished in value, that is, by the clear terms of the statute, a ground of compensation claimable by the owner of the lands, taken as an effect of the exercise of the powers conferred on the promoters of the special act. On these grounds, I think that in this case the judgment must be in favour of the defender, the owner of the lands, as it was in the former case of *Cowan's Hospital*.

LORD CUNINGHAME. I do not consider myself at liberty now to adhere to the opinion which I expressed in the case of *Cowan's Hospital*. If indeed it had been thought necessary to take any course to bring *Cowan's* case and the present under higher review, I should probably have adhered to the opinion expressed in the first case, but when the question comes before the same Court who decided the first case, I cannot repeat the opinion which was over-ruled by all the rest of my brethren in the Court.

LORD IVORY. I am of the same opinion. I have not considered myself entitled to deal with the case as if the point were at all open. Looking to the very recent case of *Cowan's Hospital*, I consider myself bound to follow it, and I bend to its authority.

The LORD PRESIDENT. I feel myself in the same position as Lord Ivory. I was not a party to the decision in the case of *Cowan's Hospital*, but that appears to me to be a decision pronounced in a case not distinguishable in prin-

ciple from the one before us; and being such a recent case, whatever views I might entertain on the general question, I do not feel myself at liberty to differ from it.

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The Court, therefore, "refuse the prayer of the said reclaiming note, and adhere to the interlocutor of the Lord Ordinary reclaimed against; Find the pursuers liable in additional expenses; appoint an account of expenses to be lodged, and remit to the Auditor to tax the same, and to report."

Hope, Oliphant & Mackay, W.S., Pursuers' Agents.

Inglis & Burns, W.S., Defender's Agents.

(J. S. M.)

THE EDINBURGH AND GLASGOW BANK v. STEELE.

No. 121.

*Missive Letters—Implement—Liability—Correspondence—Competency of reference to.—*Where a correspondence and course of treaty resulted in missive letters of offer and acceptance, wherein the terms of agreement were distinctly set forth, without any reference whatever to prior correspondence or communications:—*Held* (1.) That the rights of parties must be ascertained from the words and language used in the missives themselves, and not from anything which may have passed in the correspondence, and that the correspondence cannot be referred to even in order to ascertain the relative position of parties.—(2.) Where in implement of the agreement contained in the missive letters, the one party was taken bound to grant a conveyance, the express terms of which, however, were not set forth:—*Held*, that his refusal to grant a conveyance in the terms demanded by the other party did not destroy his right to enforce implement of the obligation in the missive letters.—*Circumstances* in which an agent was held personally liable for implement of a missive letter written by him in the course of proceedings in which he had all along acted for third parties, and in which it was not alleged that he had any personal object in entering into such missive.

This was an action brought for implement of an agreement between the 2d Division. pursuers and the defender, dated the 20th October 1851. The Messrs Feb. 17. 1853. Archibald, manufacturers, became bankrupt in January 1851. The pursuers, Edin. & Glas. the Edinburgh and Glasgow Banking Company, were their creditors for a Bank v. Steele sum exceeding £19,000, but held heritable security over certain heritable subjects, including a mill and its machinery. The security was constituted by a disposition *ex facie* absolute, and infestment. The pursuers claimed upon the bankrupt's estates, and in their affidavit, they specified their security, as constituted by disposition and infestment, valued it, and claimed for the balance. A competition arose for the office of trustee. Mr Meldrum, accountant in Edinburgh, was supported by the pursuers and one section of the creditors—Mr Foulds, accountant in Glasgow, by another section. In the end their Lordships of the Second Division preferred Mr Meldrum, who was duly confirmed by the Sheriff, but the case was taken by appeal to the House of Lords. The defender, Mr Steele, writer in Glasgow, in the course of the competition, had acted for Mr Foulds and the creditors who supported him, and in the litigation consequent upon the competition, he acted for Mr Foulds, who was the only party to the litigation. In these circumstances, the defender opened a negotiation with the pursuers, for the purpose of purchasing the pursuer's claim upon the bankrupt estate, and with that view he wrote the following letter, upon which the present action is founded:—

"Glasgow, 20th October 1851.—To Charles James Kerr, Esq., secretary, and for behoof of the Edinburgh and Glasgow Bank, Edinburgh,

Archibald Bro's seq".

Feb. 17. 1858. I hereby offer you the sum of four thousand five hundred and eighty-five pounds, for an assignment to the debt due to the Bank by the bankrupts, upon making payment of which, the Bank shall be bound to convey to me or to my assignees, at our expense, all right or interest belonging to the Bank in the lands, mill, and machinery at Keillersbrae, under the absolute conveyance in favour of the Bank, and relative lease, and I will free and relieve the Bank of all feu-duties and other burdens affecting the subjects, past and future, so far as not already paid, and undertake the responsibility of obtaining the consent of the Earl of Mar, as superior, to the conveyance of the subjects in my favour.

Edin. & Glas.
Bank v. Steele

In regard to the mode of payment, I am to have the option of paying three thousand pounds in cash, on or before first December next, and the balance by a bill, with security to the satisfaction of the Bank, at twelve months from first October current. If I settle in this manner, I shall only be chargeable with interest at the rate of two and a-half per cent. upon these sums respectively, from said first October current. If I do not pay the three thousand pounds in cash, as above, then I shall be bound to pay that sum by bill, with security to the satisfaction of the Bank, at six months from said date; and in that case I shall be chargeable with interest at the rate of five per cent. on the whole price, from the said first of October current.

I shall have the foresaid period, until first December, to find the cash, and name the security. The above price is to be held as in full of the outlays in keeping up the mill, and the expenses incurred by the Bank and by Mr Meldrum, in the competition with Mr Foulds, and which have been ascertained to amount to two hundred and eighty-five pounds; and it is a condition of this arrangement that Mr Foulds withdraws his Appeal to the House of Lords, to which the Bank were parties.

The Bank shall be entitled to retain possession of the various bills constituting their debt against the bankrupts, as they do not intend to assign to me any right of action against the co-obligants thereon, but the Bank undertake to produce the bills on all necessary occasions, to support the assignation in my favour, to the extent of a claim against the estate of the said Archibald Brothers. The Bank are to be entitled to retain any payments received from other obligants since the date of sequestration, and in their assignment, they will give warrandice from fact and deed only.

In the event of this offer being declined, it shall not be competent for you or any other party to found upon it, or upon the previous correspondence, either in the proceedings with Mr Foulds, or any other proceedings.—I am, dear Sir, yours truly.”

(Signed) “WILLIAM STEELE.”

To this letter, the following answer was returned :—

Edinburgh and Glasgow Bank, Edinburgh, 24th Oct., 1851.

William Steele, Esq., Writer, Glasgow. Dear Sir, I this morning received your offer, of which a copy is prefixed, dated 22d inst., which I submitted to the directors this day; and as authorised by them, do hereby accept thereof, on the conditions therein mentioned, with the explanation that the outlays on the mill are merely those outlays which have been borne by the Bank, but not any expenses or outlays on the mill, which the trustee, Mr Meldrum, may

have made. I have no doubt this is in accordance with your own understanding.—I am, &c. Feb. 17. 1853.

(Signed) CHARLES JAMES KERR."

Difficulties having arisen in the way of carrying out the proposed arrangement, more especially with reference to the terms of the conveyance, the Edinburgh and Glasgow Bank raised this action, concluding against the defender personally for implement of the obligation alleged to be undertaken by him in his letter to the Bank. Edin. & Glas.
Bank v. Steele

To this action the defender pleaded, *first*; that he is not bound individually, but only as the representative of other parties, against whom alone the pursuers have their remedy; and, *second*, and alternatively, that the pursuers by refusing to grant a disposition in the terms which the contract required, and so exposing the defender to loss, have not implemented their part of the contract.

A record was made up, and in support of his pleas, the defender referred to a correspondence between him and the Bank, as shewing that in the transaction, he acted as agent and not as principal.

The Lord Ordinary (Rutherford), held that upon granting and delivering to the defender a deed of assignment and conveyance, as the same may be adjusted at the sight of the Lord Ordinary, the pursuers are entitled to decree against the defender for principal and interest, "and are also entitled to decree for the expenses incurred or to be incurred by them in the preparation and revising of the said deed of assignment and conveyance, and also to decree in terms of the conclusions of relief, and for the expenses of process," &c.

In a note appended to his interlocuter, his Lordship remarked: "Looking to the terms of the contract, it is not easy to conceive any form of words by which an individual obligation could be more effectually and unequivocally constituted. There is no direct or immediate reference to constituents in any part of the defender's letter. He does not bind them, or refer to any authority on which he is acting. . . . Whether any reference to preceding correspondence is admissible to qualify an agreement so distinct and unequivocal as that libelled, might well be disputed, and the Lord Ordinary has seen very few cases which shewed more clearly the propriety of refusing any such reference for the purpose of controlling the construction of the instruments which give the result of the transaction. But it seems admissible and fair to look to the correspondence and circumstances of the case, that the Court may see the relative position of the parties at the time of entering into the agreement, to the effect of reading it with full knowledge of their respective positions. To this extent the pursuers did not deny the relevancy of looking into the correspondence, maintaining also, that even if it were read for a stronger purpose, the conclusion would be in their favour, and against the defender," and his Lordship, looking to that correspondence, whether for the admissible purpose of ascertaining the circumstances in which the parties transacted, or more questionably, for the purpose of construing the agreement, could find nothing whatever to control its plain import."

The defender reclaimed.

Young and Penney for the reclaimers.

Clark and Macfarlane for the respondents.

Feb. 17. 1858. **THE LORD JUSTICE-CLERK** was of opinion that as there was nothing whatever after the date of the missives which could exclude the Bank from enforcing whatever liability was undertaken by Mr Steele by the missives in question, the case must be considered on the proper construction and effect of these missives. In judging of the legal effect of these missives, he laid entirely aside all the previous correspondence. It was not competent to refer to it as affecting in any way or to any extent the result to be drawn from the completed and formal missive. His Lordship was not able to concur even in the limited use which the Lord Ordinary had made of it, or to enter into the distinction on which that limited use is rested. It is clear that even that limited use of prior correspondence, if competent, might in this and in many other cases, directly and necessarily affect the construction of the formal and completed missives written for the very purpose of settling and embodying the adjusted contract of parties, and that if from prior correspondence the relative position of parties is to be collected so as to read the adjusted and final documents with the legal knowledge which such correspondence may afford, the Court may be driven into views of the real object, and true meaning of the final missives, which could not but materially affect their construction. Nor is such limited use of the correspondence necessary in this case in order to ascertain the relative position of parties. For the pursuers admit that it was in the capacity of agent that the defender was brought into the affairs of this sequestration, and they do not aver that he had a direct personal object in entering into the missives libelled on beyond the interest of agent for one set of the creditors. But where an offer is made by a party directly in his own name, thereby undertaking in explicit and unambiguous terms personal obligations for payment in return for a purchase of claims on a bankrupt estate, (a transaction very different from a proposal passing between two agents for a sale of a landed estate) any knowledge as to the relative position of parties cannot affect the personal obligation so directly undertaken, or any matters therein mentioned. Besides, the offer here makes reference to no prior letters. It is, in itself, full, explicit, and complete: so much so, that it is not pretended that in order to explain any part of it any reference to the former correspondence is necessary, and, for this very reason, any reference to prior correspondence is excluded, and is wholly incompetent. On the same ground, any general proof—which was offered in this case—as to the meaning and understanding of parties, is also incompetent. On a construction of the missives, the defender must be held to be personally bound. As to the defender's second plea, while his Lordship was inclined to think that the defender was right as to the form of the deed to be granted by the Bank, he could not hold that by the refusal to grant the deed the Bank had lost their right to enforce generally performance of the contract. Such a defence depends, generally, very much on three considerations;—in some cases upon the length of time which has elapsed, and in others, on the nature of the objection raised to the character of the deed required under a missive such as this: and, also, on the nature of the injury alleged to have resulted from the refusal to grant the proper deed. But neither of these considerations operated in the present case so as to deprive the Bank of their right to enforce implement of the contract. As to the finding as to expenses, the Lord Ordinary had not by any direct finding held the defender

to be wrong as to the form and character of the deed which the Bank were to grant. The finding is, therefore, premature, as it may turn out to exclude a just claim for expenses by Steele as to the revisal of the deed.

Feb. 17. 1853.
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LORD WOOD. I entirely agree in the opinion of the Lord Ordinary, that, looking to the terms of the contract, it is not easy to conceive any form of words by which an individual obligation could be more effectually and unequivocally constituted. Although the contract of parties is not embodied in a formal deed, but stands upon missive letters, it appears to me, that in conformity to the undoubted general rule, the correspondence by which it may have been preceded is not admissible as evidence to control the meaning which the missives themselves distinctly bear, or as here contended for, to limit the obligation which, upon their terms, would be clearly held to be personal, to one by which the granter would be only bound as the representative of other parties, against whom alone any remedy would lie. Where an agreement is to be founded on, or drawn from, a course of correspondence, without having been made the subject of a separate and distinct offer and acceptance, the case is quite different from one in which, although there may have been a preceding correspondence and course of treaty, this results in missive letters of offer and acceptance, wherein the terms of agreement are distinctly set forth without any reference whatever to prior correspondence or communings. In the latter case, (which is that before the Court,) the missives are to be taken as the embodiment of the final and concluded will and agreement of the parties. They must speak for themselves, and the rights of parties must be ascertained from the words and language there used, and not from anything which may have previously passed. With regard to that portion of the correspondence that followed the agreement, which it was insisted was admissible for construction of the missives, I apprehend that it also ought to be rejected. I do not say that in no case could any letter of later date than the missives containing the agreement of parties be founded on : because it is possible that their tenor might be such, that they might be held to form substantially part of the agreement, as being directly explanatory of its terms ; but nothing of that kind is set forth in the record in relation to the letters in question, nor was it so represented at the debate. I do not understand that by the interlocutor under review the Lord Ordinary has pronounced any judgment in regard to the form or term of the conveyance to be granted by the pursuers to the defender. That is left open for subsequent judgment. There can be no doubt that there was much materiality in the form of the conveyance to be granted by the pursuers. But however material it might be, it is to be observed, that nothing specific is said in regard to it in the missives of agreement. The possibility of question or difference of opinion, therefore, with respect to the form in which the conveyance was to be framed, was not excluded by any express stipulation. I cannot come to the conclusion, that whenever these differences did arise, that the defender was entitled to break off the bargain, and to put the case of his right to do so upon the issue of—whether he was well founded in his contention as to the description of deed which the pursuers were bound to grant in implement of their undertaking in the agreement. It seems only necessary to attend to the length to which such a view of the matter might go, to be satisfied of its unsoundness in a case like the present. I

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Feb. 17. 1853. concur with the observations made by your Lordship as to the prospective finding in the interlocutor.

Edin. & Glas. LORDS COCKBURN and MURRAY expressed opinions in conformity with those
Bank v. Steele delivered.

The COURT, therefore, "refuse the said reclaiming note, and adhere to the interlocutor reclaimed against, and find the claimer liable in expenses since the date of the said interlocutor; but recall the finding as to the Bank's right to decree for the expenses incurred, or to be incurred, in the preparation and revisal of the deed of agreement and conveyance referred to in the pleadings, reserving to the Lord Ordinary to determine the point as to expenses after the said deed is adjusted; appoint an account of the expenses since the date of the interlocutor, to be given in, and remit to the Auditor to tax and to report."

Gibson-Craig, Dalziel, and Brodie, W.S., Reclaimers' and Defenders' Agents.

Lokhart, Hunter, Whitehead, and Greig, W.S., Pursuers' and Respondents' Agents. (J. S. M.)

WEBSTER v. MACKENZIE.

No. 122.

Poor Law—Relief—Industrial Residence.—Where a party resided in a parish for three years, and at the expiry of that period applied for and obtained parochial relief—*Held*, that he not having previously resorted to public begging as a means of livelihood, nor made any public demonstration of his poverty, it was incompetent to inquire as to what was the source of his subsistence, and that he must be held to have supported himself during his residence, and therefore that he had acquired an industrial residence in the parish.

1st Division.

Feb 18. 1853.

Webster v.
Mackenzie.

This was an action at the instance of the parish of Grange against the parish of Forglen for repayment of L.19 : 2 : 6, advanced by the parish of Grange for the aliment and support of James Tocher, a pauper, and his unemancipated children. The allegations of the parish of Grange were, that at the term of Martinmas 1841, Tocher, being then an able-bodied man, removed with his wife and family, consisting of three unemancipated children (the eldest being then under eight years of age) from the parish of Forglen to that of Grange, in which he became tenant of a small croft, and in which last mentioned parish he has resided ever since. Soon after coming into Grange, his health began to give way, and his eyesight to fail him. Before he had been much above two years in that parish, he became unable to labour his croft, to pay the rent thereof, or to support himself or his infant family. In consequence of this, he became dependent, in a great measure, on the charity of others for support to himself; and was obliged, in the month of October 1844, to apply to the parish for relief to his daughter, Katherine, then aged eight years, who about that time had met with an accident, which had permanently disabled her. For that daughter he then obtained relief from the parish, and which has ever since been continued. Before James Tocher had been three years in the parish of Grange—that is, prior to the term of Martinmas 1844—he had become an object of parochial relief, and incapable of acquiring an industrial residence there, or anywhere else, and this, notwithstanding that no formal application for relief, for himself at least, was presented by him till about a year thereafter. In the month of November 1845, he made a verbal application to the pursuer, the inspector for the parish of Grange, under the Act 8 and 9 Vict. c. 83, for relief to himself

and his other unemancipated children, and the pursuer being satisfied that they were proper objects, granted interim relief, reporting what he had done to the next ensuing meeting of the Board, which was held on 27th November thereafter. At this meeting the board approved of the pursuer's conduct; but considering that Tocher had become an object of relief within three years of his having come into the parish of Grange, declined to recognise him as a Grange pauper, or as having acquired a settlement in that parish, and, accordingly, instructed the pursuer to intimate the application to the parish of Forglen, and to apply to that parish for repayment of the advances. With this demand the parish of Forglen refused to comply, pleading that Tocher, having admittedly left Forglen an able-bodied man at Martinmas 1841, having gone to Grange parish, and there maintained himself for *three years*, without resorting to public begging, without having received or applied for parochial relief, and not having become an object of relief, acquired a settlement in Grange parish, even if he had not followed an industrious occupation, which completely liberated the parish of Forglen; *Rescobie*, 28th November 1801.

Feb. 18. 1843.
Webster v.
Mackenzie.

An action was raised in the Sheriff-Court at the instance of the parish of Grange, to enforce their claim. Proof was allowed, and the Sheriff-substitute found for the pursuer. This judgment was adhered to by the Sheriff-depute on appeal.

The parish of Forglen advocated the cause, and the Lord Ordinary (Robertson) reported the case to their Lordships of the First Division.

T. Mackenzie was for the advocator.

Moir for the respondent.

The LORD PRESIDENT. This case turns substantially on the question whether this pauper acquired a residence in the parish of Grange by three years' industrial residence. It does not appear that, during the three years of his residence, he had applied for relief for himself, but he had done so for his daughter, and this circumstance may come to be of some consequence as affecting himself. The averments are, in the first place, that the pauper had applied for and obtained relief before the operation of the new statute, therefore that placed him within the pale of the old law; in the second place, that he applied for and obtained relief for his daughter in the month of October 1844, which was before he had been three years resident in the parish; and in the third place, that he had become permanently disabled himself, by which, besides being in a great measure dependent on others for relief for himself, he was obliged to apply for relief for his daughter.

Now the proof which has been adduced is not very clear on either of the points on which the claim for relief is rested. As to Tocher himself, it does appear that he was infirm; and it appears that he had but slender means of support, but it does not clearly appear that he had no means wherewith to support himself and family, although it might possibly be so. It does not appear that he obtained charity from others. Now he is living in the parish of Grange, and so far as the proof goes, without the aid of others. His means may have been slender, and his staying there may have exhausted his capital, but so long as he had capital he was not an object of parochial relief. I

Feb. 18. 1853. am quite aware that under the old law there was much useless inquiry whether the party was a fit subject for parochial relief; but in all these cases there was some element of obtaining charity or otherwise, as evidence of the mode of obtaining relief. But a man may live in a most miserable manner, and hold himself out to be a man of great poverty, and yet if he does maintain himself without extraneous aid, I do not see by what conjecture we are to consider him a fit subject of parochial relief. That this man was feeble and infirm does not exclude the means of obtaining a settlement, if he maintained himself. But as to the daughter, the date at which she met the accident was before Martinmas, old style; the date at which she applied for and obtained relief does not clearly appear. But when we come to sift the accounts of the parish thoroughly, I am of opinion that there is no evidence of aid having been given for this daughter anterior to January 1845. That the man has an infirm daughter, whom he is under a natural obligation to support, is not sufficient to prove him a fit subject of relief; and although it may make his case harder, yet if it does not bring him into the condition of obtaining extraneous charity for his support, it does not bring him within the class of cases in which relief has been granted; and, therefore, I am of opinion that we ought to alter the interlocutor.

Webster v.
Mackenzie.

LORD FULLERTON. I am of the same opinion. In the first place, I agree in thinking, that though the evidence is not particularly clear, we are entitled to say there is not sufficient proof that either this party or his daughter received parochial relief before the expiry of the three years. That being the case, the point between the parishes turns on this, what shall be held to constitute a residence, giving a party a claim for settlement against the parish in which he happens to reside for three years. Shall it require that there shall be actual application for relief, or is it enough for the parish of Grange to bring evidence that the party was in bad health, and to conclude, from circumstances of various kinds, that the presumption is, that the party was not able to support himself? I agree entirely that we must have some kind of proof to satisfy us, not only that the party was physically in a situation which might have given him a claim to parochial relief, but that he was, *de facto*, in a situation which made it necessary for him to make a claim. Now we have no evidence of that. He was a poor person—that is quite clear; but he was a poor person maintaining himself somehow for three years; and then there is this other consideration, this is not a question in which the pauper has any interest at all. It is a question between the two parishes. Now, is the parish of Grange, or any other parish in which a person may happen to reside for three years, entitled to say that the party has not acquired a residence, because if he had applied for relief he would have got it; that his circumstances were such, that an application for relief could not have been refused? Are you to institute an inquisitorial inquiry into the circumstances of this person, to ascertain whether he was supporting himself or not? There is not even an attempt at that here. I must say, that though I am not for straining the law farther than it has already been, I think this parish of Grange is not entitled to make any claim for relief against the parish of For-glen.

LORD CUNINGHAME. If the provision contained in the close of the 76th section of the Poor Law Act, can be so construed as to import that residence

for three years from the passing of the Act, in any parish, without public Feb. 18. 1853.
 begging or receiving aid from the parochial funds, shall be sustained as a settlement, I could have no hesitation in acceding to the opinion delivered; for Webster v. Mackenzie.
 there was no relief given from the parochial funds in the present instance, nor any application for relief; and as this would be the plainest and perhaps most safe interpretation of the Act, I must own I have no confidence in acting on any other. At the same time, if it be competent, as from the case of *Runciman*, it seems to have been, under the old law, to take into view the health and necessities of an individual and his family, who have removed to a new parish, I find it difficult to differ from the learned Sheriff, when he finds, that this aged cottar, nearly *blind*, with a *lame* daughter, was not a fit "object of parochial relief." Still, this opinion depends so much on a peculiar construction of the Act, not hitherto sanctioned, that I cannot urge my opinion against those of your Lordships. One result follows from the opposite views of my brethren, that if the cottar truly was an object of parochial relief, (as I think he was), and received it not from the searching humanity of the superintendents of the poor, in his new residence, that parish alone can now suffer from their niggardliness, as a settlement is established, which a proper and benevolent attention to the wants of an infirm family would have precluded.

LORD IVORY. I am unable to resist the conclusion, that this interlocutor must be altered. I am satisfied that there was no actual parochial relief till after the three years. The case, therefore, reverts to the general and most important question, whether, under the former law this party was such an object of parochial relief as to entitle us to refuse a settlement by residence in the parish of Grange. In the case of *Hay v. Forbes*, June 1851, in which reference was also made to the case of *Runciman*, the Court come substantially to this conclusion, that unless the party had applied for relief, or made such palpable demonstration of his poverty by public begging, &c., they would not encourage inquiry into his private affairs. They also laid down the useful rule, that in a question of settlement by residence, between a pauper and the parish, it might not be well to deal as stringently with the evidence as when the question is between parish and parish. But without the necessity of adopting that as an absolute rule, I think the cases are decided in a favourable direction for the judgment now proposed. It is sufficient that the judgment is sufficient to cast the balance, and incline us to lean to a rule that is salutary, instead of one that would introduce vagueness into this branch of the law. This party was in poor circumstances; but not in such poor circumstances as to cast himself as a pauper on the parish. He may have obtained relief from benevolent individuals; but the only fact we have established is, that wherever he obtained his means of living, it was not from the parish. It was a fight against poverty, carried down perhaps to the last verge, but he was not a pauper. There is the absence of any thing like public begging. There was no claiming against the parish, and no aid given; and so, in the special circumstances of the case, I am quite satisfied that the safest judgment is to alter the interlocutor of the Sheriff.

The COURT "find it established, that for more than three years immediately preceding January 1845, James Tocher, and his family, resided in the parish

Feb. 18. 1853. of Grange, and that in January 1845, parochial relief was afforded to his daughter, who resided in family with him; Find it not established by proper and sufficient evidence that, previous to January 1845, parochial relief was given to, or was applied for, by James Tocher, or any of his family, or that he was in such a state of disability and destitution, as to prevent his residence in the parish of Grange, for the said period, from giving him a settlement in that parish; therefore advocate the cause; alter the Sheriff's judgment, and as-soilzie the defender from the whole conclusions of the summons in the Inferior Court, and decern; find the pursuer liable in expenses, both in this Court and in the Inferior Court, and remit to the Auditor to tax and report."

Webster v.
Mackenzie.

James Burness, S.S.C., Agent for Advocator.

Barron and Haggart, W.S., Agents for Respondent. (J. S. M.)

No. 123. BORRON OR HOGAN v. MAGISTRATES OF MUSSELBURGH.

Act 1696, cap. 5—54 Geo. III., cap. 137.—Held that a burgh corporation cannot be made notour bankrupt.

1st Division.

Feb. 19. 1853.

Borron v.
Magistrates of
Musselburgh.

This was a multiplepinding in which the pursuers were respectively feuars, tacksmen, or tenants holding under the Provost, Magistrates, and Town Council of the burgh of Musselburgh as a corporation, and as representing the whole body and community of the burgh. Arrestments had been used in the hands of the pursuers, at the instance of certain creditors of the burgh. A competition ensued, which depended on the question, whether the corporation of the burgh of Musselburgh could be made notour bankrupt.

The claimants, Wilsons, constituted their debt, and used arrestments on the 15th and 16th July 1850, and in respect thereof, they claimed a preference as first arresters.

The claimants, Hogans, likewise constituted their debt, charged the corporation thereon, and, on the 22d August 1850, used arrestments, which remained unloosed for fifteen days, and which are still undischarged. The other claimants have likewise constituted their debts, and used arrestments, in the month of November 1850. Thus standing the claims, the Hogans maintained that the notour bankruptcy of the burgh was effected on the 22d August 1850, and that, as the prior arrestments were used within sixty days of the bankruptcy, and the latter ones within four months of it, they all fall to be ranked *pari passu*. On the other hand, the Wilsons maintained that there had been no notour bankruptcy, and that they are entitled to be preferred *primo loco*, and the other claimants according to the date of their respective arrestments.

The Lord Ordinary, (Anderson), held "that the corporation of the burgh of Musselburgh has not been made notour bankrupt; Finds that there is no room for a *pari passu* ranking among all the arresting creditors; Finds that the claimants must be preferred on the fund *in medio*, according to the priority of their respective diligences," &c.

In the note appended to his interlocutor, his Lordship remarked:—"It is quite clear that under the Act 1696, cap. 5, a corporation could not have been made notour bankrupt. The requirements of that statute are, that the debtor shall be under diligence by horning and caption, and that either he has been incarcerated or that he has evaded or resisted incarceration. It is imprison-

ment of the person, and not diligence against the property of the debtor, which is adopted as the test; and accordingly, in the only case in which the point was raised, (*Grant v. Cunningham*, 5th June 1747, Mor. Dic. 1210), it was decided that a burgh incorporation could not be rendered notour bankrupt under the provisions of that statute. These provisions, however, were extended by the Act 54 Geo. III., c. 137, and certain equivalents for imprisonment were introduced. But the question still remains, whether a burgh falls within the more enlarged range of this recent enactment. It is there enacted, that if any person "not liable to be imprisoned by being in the sanctuary, or by reason of privilege or personal protection, a charge of horning executed against him, together with either an execution of arrestment of any of his effects not loosed or discharged within fifteen days," &c., shall be held equivalent to notour bankruptcy. Looking to the phraseology employed, it may very reasonably be inferred that the legislature did not contemplate the substitution of equivalents in all cases where diligence by imprisonment could not be enforced. It specifies the particular instances in which non-liability to imprisonment shall warrant effect being given to the substituted remedy; but this implies that there may be other instances to which the rule does not apply, for surely if the legislature had meant to substitute the attachment of property wherever incarceration was impossible, the enactment would have been expressed in more general terms. It never would have resorted to the specification of particular instances, which, according to the ordinary canons of construction, implies a restriction to those that are specified.

Again, in furtherance of the same general view, it may be observed that the words of the clause imply that there is a capability of imprisonment on the part of the debtor, although protected from it by adventitious circumstances. Retirement to the sanctuary, privilege, personal protection, all pre-suppose a debtor capable of imprisonment, but who, in respect of these causes, enjoys an immunity from its rigour. But the corporation of the burgh of Musselburgh is very different from any thing contemplated by the statute. It is held no doubt in the eye of law, and by legal fiction, to be a person; but it has no *materiality* admitting of imprisonment. Personal diligence cannot even be enforced either against its magistrates or against any of the corporators for a proper debt of the corporation. It owes its immunity from imprisonment, not to any of the causes particularised in the statute, but to what is inherent in its very constitution, that its personal protection is impracticable. The case of a burgh being thus peculiar, it lies with those pleading its notour bankruptcy to show under what part of the statutory rule it comes. "Retirement to the Sanctuary" is out of the question. Peers, and those having the privilege of Parliament, as well as others, like married women or lunatics, who, from peculiar circumstances attaching to them at the time, are privileged from arrestment for civil debt, are the appropriate subjects of "privilege;" while "personal protection" applies to those who owe it to a decret of Court obtained on their own application. The analogy of ordinary trading companies does not hold. They may be made notour bankrupts, not under the equivalents of the Act 54 Geo. III., but under the statute 1696. It has so been decided, and on this ground, that decrees against the company may be followed out by incarceration of the individual partners.

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Musselburgh.

The only authority bearing on the subject is to be found in Bell's Commentaries, vol. ii., p. 166, who indicates an opinion in favour of a corporation being made bankrupt by the means devised under the Act 54 Geo. III. The opinion, however, is unsupported by authority of any kind,—it is merely a *dictum* of the author; and it does not appear under which term, in the extended enactment, he understood corporations to come, nor does it appear clear whether he meant the *dictum* to apply to such corporations as burghs. The Lord Ordinary knows the weight to which an opinion from such a quarter is entitled, and has felt much hesitation in coming to a different conclusion. But the point is now raised for the first time for judicial determination, and as it appears to him, that according to the sound construction of the statute, 54 Geo. III., the equivalents of diligence against property cannot be admitted in the case of burgh corporations, he has decided in the prefixed interlocutor that the attempt to make the burgh of Musselburgh notour bankrupt, cannot be supported in law, and consequently, that the diligence of the creditors must be ranked according to their priority in date.

Against this interlocutor the Hogans reclaimed.

Young, and the *Dean of Faculty*, for the reclaimers, referred to the 54 Geo. III., c. 137, and Bell's Com., *supra*, and pleaded that a corporation might competently be rendered notour bankrupt.

Macfarlane, and *Deas*, *contra*.

THE LORD PRESIDENT. There are no words in the statute that can reach this case. I do not see how it can be classed with parties that are liable to be imprisoned at all. I cannot go along with the doctrine laid down by Bell, and I doubt much if he had applied his mind to the question, when he says there can be no doubt on the question. The other argument is, that there is no distinction between this and a mercantile company. I think there is a great distinction. No doubt you cannot imprison a metaphysical company, but you may imprison the members of which it consists. I do not think the statute touches this case at all.

LORD FULLERTON. I am of the same opinion.

LORD CUNINGHAME. I agree with the Lord Ordinary in holding that there is no statutory enactment or other authority for finding that a municipal burgh can be rendered *notour bankrupt*. The section declaring that in certain cases where debtors are *protected*, or privileged from personal arrest, they may be found and declared notour bankrupts on equivalents, as by inclosed arrestments, or by poindings executed against them, is quite inapplicable to the managers or administrators of a burgh, as they are not personally bound for any contraction. And the very peculiar provision in the sequestration statute, authorizing the sequestration of partnership estates, (sec. 20,) is directed only against "the estates of all copartnerships *carrying on business* under any of the denominations or descriptions above set forth, and not within the exceptions," &c., and excludes a corporation like a burgh not established for the purposes of trade. The practice also earlier and later in cases of this description, hardly leaves any room for doubt. We have had much experience of insolvent burghs in modern times; but there is no example of any proceeding being attempted to render the corporation or corporators *notour bankrupt*, and

to follow out other legal measures, that might be competent thereon. It will ^{Feb. 19. 1853.} probably be found that the rules of common law will be sufficient for the equal distribution of the estates of insolvent corporations, when such cases occur. ^{Borron v. Magistrates of Musselburgh.}

LORD IVORY concurred.

The COURT "adhere to the interlocutor of the Lord Ordinary, reclaimed against, and refuse the note; and remit to the Lord Ordinary to proceed farther in the cause as shall be just; with power to dispose of all questions of expenses."

Robert Ainslie, W.S., Reclaimer's Agent.

Inglist and Leslie, W.S., Respondents' Agents.

(J. S. M.)

JAMIESON v. WILSON.

No. 124.

Diligence—Charge—1 and 2 Vict., c. 114, sec. 12.—A charge at the instance of an assignee of a debt, suspended on the ground that no place or date was specified in the minute for warrant to charge.

This case was reported by the Lord Ordinary, (Curriehill), on a point of ^{1st Division.} practice raised in the Bill Chamber, as to the competency of withdrawing a ^{Feb. 19. 1853.} reference to oath after a charge had been sisted for that purpose. His Lordship appended to the interlocutor reporting the case, a note, setting forth the circumstances out of which the point arose; but before pressing the objection to the competency of retracting such reference—

Young, and the *Dean of Faculty*, for the suspenders, stated as a preliminary objection to the validity of the minute craving warrant to charge, that neither the place where, nor the date when the minute was given in, is any where written on the minute, in terms of the 1 and 2 Vict. c. 114, sec. 7, and in conformity with schedule No. 5, therein referred to. The charger here is an assignee; and the minute at his instance must comply with all the requisites of the Act; *Sim v. Yuile*, 15th Nov. 1845, 8 D., p. 8.

Hector, and *H. Robertson*. The statute is not imperative but directory. The omission is not fatal, *Clason v. Clark*, 15th Feb. 1849, 11 S. 601; House of Lords, 24th July 1850, Bell's Ap. Cases, 7153.

THE LORD PRESIDENT. I do not think, that after what has taken place in the case of *Sim*, we can do any other thing than pass this note. Two things are here wanting—the place and date—whether they are essential will remain to be decided after the note is passed; but I see no grounds for holding that we ought not to deal with this case in the same way as in the case of *Sim*, and pass the bill.

The other Judges concurred.

The COURT therefore, "on report of Lord Curriehill, Ordinary, and having heard parties on that report, and on the objection stated at the bar as to the irregularity of the diligence, in respect of there being no place or date to the application by the assignee for warrant to charge, remit to the Lord Ordinary to pass the note."

C. & C. Fisher, S.S.C., Complainer's Agents.

Hunter, Blair, & Cowan, W.S., Suspender's Agents. (J. S. M.)

No. 125.

PETITION, PATRICK BOYLE.

11 and 12 Vict. c. 36, sec. 24—*Entail Amendment Act*—*Pupil—Tutor—Authority to Feu*.—The Entail Amendment Act does not confer upon the guardians of heirs of entail in pupillarity powers which they could not enjoy or acquire if the estates of their ward were held in fee-simple, and, therefore, the heritage of a pupil cannot be alienated by his tutor or factor *loco tutoris*, in the form of a feu or otherwise, unless such a transaction be necessary to save the ward or his estate from actual loss.

1st Division. This was an application under sec. 24 of the Entail Amendment Act, at Feb. 19. 1853. the instance of the factor *loco tutoris* to the Marquis of Hastings, for authority to grant a feu to the Kilmarnock Water Company. The petition, after stating that the proceeding had been approved of, and a draft feu-contract had been prepared at the time of the late Marquis of Hastings' death, in January 1851, set forth, that in discharging the duties of his office, the petitioner had his attention called to the position of the application by the late Marquis of Hastings for authority to grant the above-mentioned feu to the Kilmarnock Water Company; and, being of opinion that it would be highly desirable and beneficial for the minor to get the proposed transaction—the details of which are all thus already arranged—carried through, he formerly presented a petition to the Court, for special power to him, as factor *loco tutoris* to the present Marquis of Hastings, the heir of entail now in possession of the estate, to institute, *de novo*, and follow forth the necessary proceedings for carrying the proposed transaction into effect with the Kilmarnock Water Company, by granting a feu to them under the Act 11th and 12th Vict., chap. 36; and for authority to the petitioner, as factor, to give notice thereof to the heir of entail next entitled to succeed to the estate after the present Marquis; which application was intimated in common form; and no opposition being made, the Court granted the special powers prayed for. And the petition prayed the Court to interpose their authority to the proposed transaction, and to approve of the petitioner as factor *loco tutoris*, granting the foresaid feu.

Boyle, Pet.

The Court having remitted to the Lord Ordinary, (Curriehill), to report specially upon the competency of the application, his Lordship reported, "that in his opinion the Court cannot competently grant the prayer of the petition. This is to be regretted in the present case, because there can be little doubt that the proposed transaction would be very beneficial to the Marquis of Hastings and to the entailed estate. But since the judgment in the case of *Vere of Stonebyres*, Mor. 16,889, it appears to have been settled that the heritage of a pupil cannot be alienated by his tutor or factor *loco tutoris*, however beneficial the transaction might be expected to prove, and even although the alienation be in the form of a feu, unless such a transaction be necessary to save the ward or his estate from actual loss; and that indeed such a transaction is not saved from future challenge by its having been authorised by the Court at the time it took place. *Vide Finlaysons*, 22d Dec. 1810, and *Thomson*, 10th May 1837. The object, however, of the proposed transaction in question, is not to avoid any threatened loss, but only to attain an expected advantage. . . . The effect of the Disentail Act is merely to relieve entailed proprietors from the fetters of the entail to a certain effect and under certain conditions; and not to confer upon them powers beyond what they would have if they were fee-simple proprietors; and, in particular,

it does not confer upon the guardians of heirs of entail in pupillarity, powers ^{Feb. 19. 1855.} which they could not enjoy or acquire, if the estates of their ward were held in fee-simple. On the contrary, it does not well appear how some of the ^{Boyle, Pet.} conditions of the Act—such as emitting the affidavit required by the 6th section—could be implemented in the case of a petition by the guardian of the pupil."

H. Robertson, and Boyle, in support of the petition, referred to *Muirhead*, 4th July 1849, and argued, that taking sec. 24 in connection with sec. 31, it was evidently the intention of the legislature to enable a pupil, being heir in possession, to consent to such procedure as that now proposed; and they referred to the terms of the Pupils' Protection Act, as corroborative of this view.

The LORD PRESIDENT. I participate in the doubts of the Lord Ordinary, as to the applicant's construction of the statute being the sound one. It was intended to relieve parties placed under fetters from these fetters to a certain extent, but it was not intended to enlarge the rights and powers of parties who are placed otherwise under legal disabilities, unless there was special provision for such enlargement. It was not intended to place the pupils in a situation of greater power and advantage than is possessed by pupils who are proprietors in fee simple. Now this is an application under sec. 24; and the argument put to us, is, that pupils, who by the law of Scotland cannot alienate their heritage, are rendered not only virtually fee simple proprietors, but are entitled to act as if they were *sui generis* in every respect. The applicant certainly says that the pupil must have a tutor *ad litem*, but they stand on sec. 24 alone, and by that clause no tutor is required. The only section about tutors or guardians of any kind is sec. 31; and that section does not appear to me to have reference to a matter of this kind at all. It is in reference to consent given to proceedings instituted by parties who had a legal capacity to institute it, a section clearly necessary for carrying out of the Act; for it was plain that there would be pupils without whose consent somehow given, the law could not have effect, and therefore as the pupil could not otherwise give his consent, the legislature thus interfered, to enable him to do so. But we cannot carry that special act of legislation beyond the terms of the act itself. I do not find any other section which implies that a party under a legal incapacity, can institute this procedure. No tutor is appointed, no guardian is authorised to do any thing, but to give consent. Now, in that view of the case, I am afraid that neither under sec. 24, nor reading it in combination with sec. 31, can we arrive at the conclusion that a pupil can give consent, nor that a tutor acting for him can alienate his heritage. It is said, and was strenuously argued, that this may have the effect of preventing the useful application of the section of the statute, in all those cases in which the heir of entail happens to be a pupil; but I am bound to hold that if it had been intended to give such power to the pupil and his tutor, and which would not have belonged to him if the estate had been his in fee simple, the legislature would have given the means for removing the incapacity, which by the law attaches to him. I am not prepared to say that an heir of entail is not a liferenter, or that in the case of a pupil liferenter, there might not be authority given to alienate heritage. But we are dealing with the provisions of a particular statute; and I do not see that the statute gives that power. Whether

Feb. 19. 1853. the original proceeding had gone such a length that there shall be a mode of following it out, I give no opinion at present. But as to the proceedings instituted at the instance of the pupil and his administrator, I am afraid that there is no power under this statute for it.

Pet. Patrick
Boyle.

LORD FULLERTON. I am of the same opinion. I must say that I do not entertain the slightest doubt on the point. This application rests on the statute, and in the words of the statute there is no authority given to a factor *loco tutoris* to do that which it is now proposed to be done. It is quite true that by section 31 of the statute there are very extensive powers given to a tutor. But that is a special section altogether. It confers powers of a very special kind on tutors and curators, but then that is limited to cases of consent. It goes no farther. Whether you can take the will of the curator or tutor for the will of the pupil or minor we see nothing to enable us to determine. It contains no authority for doing so, and although loss may possibly arise in the present case, we have no alternative but take the matter as we find it, and therefore we must refuse this application.

LORD CUNINGHAME concurred.

LORD IVORY. I can arrive at no other conclusion. This obligation must be looked at as exclusively resting under the Entail Amendment Act. It cannot call in aid either the common law powers of the Court in sanctioning extraordinary procedure on the part of a factor *loco tutoris*; nor the clauses of the Pupils' Protection Act, which are limited to their own special matters and subjects. It is with reluctance, for I see the benefit that might arise to the estate, that I come to this conclusion; but I feel myself compelled to concur with the views of the Lord Ordinary in his note.

The COURT therefore refused the application.

Hunter, Blair, & Cowan, W.S., Petitioner's Agents. (J. S. M.)

No. 126.

MACPHERSON v. MACKENZIE.

Bankruptcy—Expenses—Ranking—Approval of Auditor's Report.

1st Division. Feb. 23. 1853. In this case, which was an action of damages against the defender, for not putting certain subjects, let to the pursuer, in a proper habitable condition, at the date of the tack; the jury, in March last, returned a verdict for the defender, (See vol. i., p. 396). In April following, the estates of the pursuer were sequestrated. Subsequently, the Court applied the verdict, and found the defender entitled to expenses. In the meantime, the pursuer had been discharged on a composition contract.

Macpherson v.
Mackenzie.

On the defender moving for approval of the Auditor's report and decree against the pursuer for the amount of the account,—

Shand, for the pursuer, submitted that his client was entitled to a reservation in the interlocutor, to the effect, that he was only liable in payment of the same composition on this debt as on the debts of his other creditors. The expenses were due before the sequestration, though not decerned for, and consequently, free under the sequestration.

Buchanan, contra. The pursuer's view, as to the extent of his liability, is

altogether erroneous, as he shall shew at the proper time if payment shall ^{Feb. 23. 1858.} be resisted; but in any view, having got decree against the pursuer for ex-Macpherson v. penses, we are entitled to a decerniture for the taxed amount, and approval of Mackenzie. the Auditor's report, in the usual unqualified terms.

LORD PRESIDENT. The point raised here would appear substantially to resolve into a question of ranking, and this is not the time for discussing it. A party who has got a decerniture for expenses, is entitled to have that followed up, as is here craved, when the account is taxed. We must refuse the pursuer's claim of reservation. But this will not foreclose him from contending that he is bound to pay a dividend only.

Lachlan Mackintosh, S.S.C., Agent for Pursuer.

Sang and Adam, S.S.C., Agents for Defender.

(R S.)

SIR M. S. STEWART v. J. WALKER & Co., AND OTHERS.

No. 127.

Reference, Judicial.—Parties could not agree upon the import of a judicial reference into which they had entered, and the four Judges of the Division were each of a different opinion. The Court recalled the deliverance interponing the judicial authority to the reference, and allowed parties to proceed as if it had not been entered into.

This was a combined process of declarator and interdict at the instance of ^{2d Division.} Sir M. S. Stewart against Walker and Co., sugar refiners, whose works stand ^{Feb. 23. 1858.} upon ground of which the pursuer is the superior. The object of the action was to compel the defenders to remove a weir or dam in the West Burn of ^{Stewart v. Walker & Co.,} Greenock, which is the pursuer's property. The defenders pleaded, that under &c. the feu-contract between the pursuer's father and their author, they had certain privileges of using the water of the burn, and that the dam in question was necessary to enable them to avail themselves of these privileges.

In June last, an issue was adjusted, and it was arranged that the jury trial should take place at the August sittings. On the day of the trial, however, after the jury were balloted, the parties agreed, by a joint minute, to refer to Mr Lealie, civil engineer, the question, "what works or operations are necessary or proper to enable the defenders to obtain and secure to them the full supply of water from the West Burn, to which the feu-contract entitled the defenders, in such way and manner as may least interfere with the use of the burn by the pursuer, or others, and that either by the present weir, if necessary, or in any other way which the said referee may direct, with power to him to continue, alter, or pull down the existing works, and order the erection of such other works, if any, as he may think proper; with power also to the referee to report to the Court any point which may arise, on which he thinks it necessary to take that step." To this reference the judicial authority of the Lord Justice-Clerk was interponed, on the 8d August last.

The referee inspected the place and works, and ordered statements by the parties, as to the right the defenders claimed to use the solum of the burn for certain purposes, and how far the pursuer admitted their claim. These statements being made, and being entirely at variance with each other, and the counsel having met by order of the referee, but being unable to agree as to the right of parties under the remit, the referee reported the point above mentioned to the Court for instructions.

Feb. 28. 1858. *N. C. Campbell, and Neaves*, for the pursuer; and,
E. F. Maitland, and Deas, for the defenders, had repeated debates before the
 Court, upon this interim report, and differed essentially with regard to the
 import of the reference, and the course which ought now to be pursued.

The LORD JUSTICE-CLERK, after avizandum had been made with the case, stated, that each of the four Judges held a different opinion as to the meaning of the reference, and that the only course now left was to pronounce the following interlocutor, which was done accordingly.

"Recall the deliverance of the Judge, of 3d August 1852, interponing his authority to the minute of reference between the parties, and allow the parties to proceed as if no reference had been entered into."

Patrick, M'Ewen, & Carment, W.S., Pursuer's Agents.
Duncan & Dewar, W.S., Defenders' Agents.

(W. H. T.)

No. 128.

BARTHOLOMEWS v. GARDNER.

Court of Session Act, 13 and 14 Vict. c. 36—Form of Pleading—Summons—Record—Issue.

Outer House. This was an action of count and reckoning, in which the pursuers, as executors of their deceased father, called on the defender to pay certain balances alleged to be due by him, on certain joint adventures, in the purchase of Bartholomews wood, in which they averred the defender and their father had been engaged.

In the summons, one of the alleged joint adventures was libelled to have been "in hard wood," bought at a certain time and place. In the revised condescendence, the transaction in question was alleged to have taken place "in fir wood."

The pursuer lodged an issue in terms of the statement in his revised paper.

Shand, for the defender, objected. The summons does not warrant any such issue. Its terms on the contrary are inclusive of the transaction having been in *fir-wood*, for *hard-wood* is expressly libelled.

Pattison, for the pursuers. The variation between the summons and the revised condescendence is not material. It was not necessary to specify the sort of wood at all, and there is here only a connection of what was originally alleged in the uncalled for minuteness. There is nothing in the new Court of Session Act, authorising such strict views.

LORD RUTHERFURD. I cannot grant the issue here proposed. It is not supported by the summons. It is quite a mistake to suppose that any greater latitude or looseness in pleading exists under the new than the older form of making up a record. In that particular, no change was intended, and none has been made.

J. G. Hopkirk, W.S., Pursuer's Agent.
John Rutherford, WS., Defender's Agent.

(R. S.)

No. 129.

RICHMOND v. RICHMOND.

Curator ad litem—Adherence.—In an action of adherence advocated by the defender from the Sheriff Court, the defender pleaded that the proceedings in the Inferior Court were null, in respect of no curator *ad litem* for the pursuer. The Court now appointed a curator, and opened up the Inferior Court record and proof, for the curator to consider whether he should add anything thereto.

This was an advocacy of a process of adherence, at the instance of a wife ^{2d Division.} against her husband. The Sheriff had pronounced a judgment in favour of Feb. 24. 1858. the pursuers, on the merits.

C. Scott, for the defender and advocator, objected to the competency of ^{Richmond v. Richmond.} the whole proceedings in the Inferior Court, in respect that no curator *ad litem* had been sisted for the pursuer. Darling's Practice, p. 92 and 95; Harper, 9th Feb. 1850, Ersk. I. 6, 21, More's Notes to Stair.

P. Fraser, for the pursuer. Curators *ad litem* are unnecessary in consistorial actions. This objection was never pleaded in the Inferior Court.

The Court held that the proceedings in the Inferior Court were not null in respect of no curator *ad litem*, but pronounced the following interlocutor:—"Appoint A. G. Ellis, W.S., curator *ad litem* to Mrs Mary M'Nie or Richmond; further, in respect that no curator *ad litem* was appointed in the Inferior Court, advocate the cause; alter the interlocutor complained of; open up the record as closed in the Inferior Court, recall the interlocutor circumducing the term for proof; allow the curator to consider the record, and the proof as already adduced, and the whole cause, and to report whether he wishes to make any addition to the record, or to the proof as already adduced."

C. Clark, S.S.C, Pursuer's Agent.

J. Walls, S.S.C., Defender's Agent. (W. H. T.)

RICHARDSON AND OTHERS v. GAVIN'S EXECUTORS.

No. 130.

Lis alibi pendens.—Plea of *lis alibi*, on the ground of proceedings before the English Courts, repelled, these proceedings being considered as virtually abandoned.

Partnership—Relief, Obligation of inter socios.—Held that a partner of a dissolved and insolvent company, for winding up whose affairs no steps have been taken, is entitled to sue the other partners for proportional relief of company debts, which he has been compelled to pay.

This was an action of relief at the instance of certain parties, partners of ^{1st Division.} the Forth Marine Insurance Company, against the other surviving partners, Feb. 25. 1858. and the representatives of such as are deceased. This company having proved unfortunate, in 1845 a fiat of bankruptcy was obtained against it in ^{Richardson, &c. v. Gavin's Executors.} England, under the Winding-up Act, 7 and 8 Vict., cap. 111. The pursuers alleged that they had, after the fiat had been obtained, paid certain debts of the company out of their own private funds; that owing to the company being dissolved and in a state of bankruptcy, there were no company funds to meet these debts; and they concluded that they were entitled to have relief from the defenders in proportion to their several interests as shareholders. The proceedings in the English Court of Bankruptcy had been found inextricable, and were suspended.

The executors of the late Mr Gavin, an alleged partner, objected to the competency of the action, on the ground, 1st, Of *lis alibi pendens*; and, 2d, That the pursuers' claim involved a general winding-up of the company's affairs, which could not be given effect to in such an action as the present.

The Lord Ordinary, (Cowan), sustained the competency of the action.

In a note, his Lordship observed, "Had there been proceedings depending in the Bankruptcy Court in England, under which the relative rights and ob-

Feb. 25. 1853. *Richardson, &c. v. Gavin's Executors.* ligations of the partners, *inter se*, might be adjusted, it would have been different. In that case there might have been room for the defence of *lis alibi*; or, at all events, for moving that this process should be sisted till the issue of the English proceedings. The defenders, however, in course of the debate, disclaimed any intention of contending for either of those views, and admitted that the proceedings in England, if not expressly abandoned, had at least tacitly been allowed to lie over for a long period of time, and without any steps in the suit being now in contemplation."

"It may be that a general winding-up of the affairs of this company would be an expedient and proper measure for all concerned; and it is very possible that if an action for that purpose were insisted in by the defenders, cause might be shewn for refusing to give decree in this action, till the affairs were finally wound up in that action at the sight of the Court. No such state of matters, however, exists. The only action in Court is one for proportional relief of company debts by certain partners who have paid them, against their co-partners equally liable for such debts. At common law, such an action is unexceptionable; and so far as relates to the mere question of competency, it matters not though the company be dissolved. The defences by which the action of relief may be met, and the ulterior proceedings for finally extricating the rights of the co-partners, *inter se*, may thereby be affected or modified: but the power and competency of any one partner, called on to pay the company debt, to insist for proportional relief from the other partners to the extent of their interests, remain, it is apprehended, untouched by the fact of dissolution."

The defenders reclaimed.

Penney, and *Deas*, for the reclaimers.

Donaldson, and *Neaves*, with whom *Dean of Faculty*, (*Inglis*), for the pursuers, founded on Stair, I. 8, § 9, and Bell's Commentaries, II., p. 619, in support of the right of relief claimed.

The LORD PRESIDENT. There is no sufficient reason given for disturbing the interlocutor. A remedy is claimed, to which every partner is entitled who has paid part of the company debts. The English proceedings afford no good ground for stopping those here.

The other Judges concurred.

The Court adhered, with expenses.

J. and J. Macandrew, S.S.C., Pursuers' Agents.

Thomas Ranken, S.S.C., Defenders' Agent.

(J. S. M.)

No. 131.

RUSSELL v. MALCOLM AND OTHERS, AND MALCOLM AND OTHERS, v. THE CALEDONIAN RAILWAY CO.

Compensation—Railway—Minerals.—The proprietor of an estate contracted to sell to a party the minerals lying under it, with special facilities on the surface for his operations. Considerable delay took place in completing the purchaser's right, and in the meantime, the seller conveyed to a railway company a portion of the surface:—*Held*, 1st, that the purchaser had a good claim for compensation against the sellers, in respect of any injury from the loss of those facilities which had been guaranteed to him, which he might instruct before beginning the works, and also in respect of any injury which might afterwards be as-

certained during the working of the minerals, in so far as not covered by the damage or price which the railway company might have to pay under the Railway Clauses Act. *Held*, 2d, that the Company could not be compelled to give to the purchasers any of the rights or facilities which the sellers had agreed to give to him.

The lands of Alleysbank originally belonged to the deceased Margaret Auld, 2d Division. wife of the pursuer Malcolm, and her sister Marion Auld, to the extent of Feb. 25. 1858. two-thirds, *pro indiviso*, and to Henry Wardrop and his sister Mrs Muller, to the extent of the other third, *pro indiviso*. In 1844, Margaret and Marion Auld conveyed their two-thirds to Wardrop; but by the conveyance, the whole coal and other minerals in the said lands were expressly reserved entire to themselves, and to the other *pro indiviso* proprietors thereof, and their respective heirs and successors, and it was provided that they should accordingly have full power, as formerly, by themselves or their tacksmen or servants, to sink pits, and perform other operations on any part of said lands, for working the coal or minerals, and to sell or let their shares in the said coal, at pleasure, upon payment of any damages which might be occasioned by working out and carrying away said minerals, to the said Henry Wardrop, and the other proprietors thereof for the time. Russell v. Malcolm, &c., and Malcolm &c., v. Cal. Rail. Co.

In November 1845, Margaret Auld, Marion Auld, Wardrop, and Mrs Muller, agreed to sell to Archibald Russell, all the coal and minerals belonging to them, as *pro indiviso* proprietors, under the said lands. It was provided with much care and detail, in the articles of roup, that the purchaser should have special facilities for the use of the surface for conducting his operations, on paying compensation to the proprietors of it for the time, for such part as should be broken up or used. His right to be limited to thirty years. (See the findings in the interlocutor of the Court.)

In January 1846 the Clydesdale Junction Railway Company gave the usual notice to Wardrop and Mrs Muller, as proprietors of the surface, that they required a stripe of the land for their works. The amount of compensation being arranged, the Company obtained a disposition in the statutory form, in August 1846.

The conveyance of the minerals to Russell had not at this time been completed, and in 1847, he, upon the ground that they had disqualified themselves by the sale to the Railway Company from implementing their contract with him, raised against them the first of the present actions, concluding for implement and damage against them. In that action, on a reclaiming note against a judgment of the Lord Ordinary, (Ivory) the Court found, that "the defenders must at their own expense, in the first instance, convene the Railway Company in an action in their names, and, if so advised, with concurrence as in name of the pursuer, in order to ascertain the liability of the said Railway Company for damages in respect of the alleged injury caused by the line of railway to the working of the coal sold to the pursuer, as to the use of the surface for the purpose of working the same;" and superseded consideration of the cause in the meantime.

In consequence of this interlocutor, the second of these actions was raised by Malcolm, (representing his wife, who had died since the commencement of the transactions), Miss Marion Auld, the trustees of Wardrop (also recently deceased), and Mrs Muller, with the concurrence of Russell, concluding for de-

Feb. 25. 1853. clarator, that the whole of the coal and minerals in question belonged to them for their *pro indiviso* shares; that under the disposition by Margaret and Marion Auld to Wardrop they reserved their shares of minerals entire, &c.; that the Russell v. Malcolm, &c., and Malcolm &c., v. Cal. Rail. Co. said coal and minerals, with relative servitude on the surface for working them, now stood duly vested in the pursuers, and that they were entitled to convey the same to Russell in terms of the original agreement with him; that by their disposition to the Railway Company, they did not convey any portion of the minerals in relative right of servitude to them, and that Russell, on obtaining from the pursuers such conveyance to the minerals, &c., should be entitled to work them, and to use the surface so far as necessary for that purpose, unaffected by the disposition granted to the Company, or any occupation following thereon, in the same way as if such had not been granted; or at all events, that the Company were liable in damages to him for being prevented from using the portions of surface which they had obtained.

The Lord Ordinary (Anderson) reported the case to the Court.

T. Mackenzie, Neaves, Macfarlane, and Deas, for the pursuers, *Malcolm, &c. Penney*, for Russell; and

The Dean of Faculty, and *H. Robertson*, for the defenders.

The Court proceeded to advise the two cases at the same time.

THE LORD JUSTICE-CLERK. In disposing of the two actions now before us, it will be most convenient to take, first, the action at the instance of Russell, and to consider what rights he acquired from the coal owners who sold the field to him. In the next place, the question arises, what impediment to the exercise of his rights has arisen from the acquisition of a part of the surface by the Railway Company, and the formation of the line on that portion? And lastly, whether he has any, and what ground, or measure of relief, and against what parties?

Mr Russell bought, for a large sum, at a public sale, this piece of ground. Under the articles of roup the owners, *pro indiviso*, all concur, and are bound to grant him a disposition with absolute warrandice. The sale was for thirty years, indicating that the object was to work out the coal as soon as possible, and of course to have every facility for doing so. Of the necessity of such facilities the sellers were quite aware, and it is clear that the surface was sacrificed for the sake of obtaining a large price for the coal. All this is clear from the terms of the article of roup. I am therefore of opinion, that Russell bought under conditions which completely, and without restriction of any kind, subjected the whole surface to him for his benefit, in working, storing, and carrying away the coal. And as some of the parties joining in this sale of the coal were also the sole proprietors of the surface, the right so conveyed to him flowed from parties entitled to put the whole surface under this absolute subjection to the coal. The right so acquired, as I have already said, is much greater than the ordinary right belonging at common law to the owner of a mineral estate against the owner of the surface.

In the second place, it is a plain matter of fact, that the whole stripe of ground acquired by the Railway Company is lost for any use to which the coal owner might wish to put it, for his coal operations. Also that the sur-

face is cut in two by an insurmountable obstacle to continuous communication. Feb. 25. 1853. The power to make the railway had been granted before the sale; but that was in 1845, and it was therefore far from certain that it would ever be used. *Russell v. Malcolm, &c., and Malcolm &c., v. Cal. Rail. Co.* The sellers do not proceed to constitute, without delay and effectually, the right so conveyed to Russell against the owners of the surface, who are two of their own number, and it was not perfected before the notice by the Railway Company was given. We need not therefore enquire what would have been the effect, had it been so perfected. This saves also the consideration of the effect of the provisions in the Railway Clauses' Act. But in the meantime, two of the sellers proceed to alter materially the situation of Russell, and to sell to the Railway without protection of his rights. That they were compelled under the Railway Act to sell, is of no consequence, for they were bound to Russell in absolute warrandice, and had they completed his right by infestment, the Company would have paid part of the compensation to him. The last point is, against whom has Russell any ground of relief. He brings no case against the Railway Company, and goes directly against his authors, and he is not bound to take any other course. The burden or servitude over the surface was not constituted so as to be effectual to Russell. A latent contract, left solely on the personal obligation of the sellers, cannot qualify the right acquired by the notice, nor can it be enforced against the Railway Company, either to restrain them in the exercise of their statutory powers, or to establish a claim of damages. The sellers, however, were bound to perfect his right. They leave it on their personal obligation. All were bound to make the right complete; but on two of them, scheduled as owners, the obligation to secure Russell was still more stringent. The answer on the part of the sellers to Russell's claim of damages, that he may now throw up his bargain, palpably fails. He most justly says, "I bought the coals, I adhere to my bargain." I therefore hold all the defenders in the original action liable to Russell; but, of course, one set of them may have relief against the others, who were sole owners of the surface. But an important question still arises. The Railway Clauses' Act provides for compensation to mineral owners, varying according to the interruption to working both above ground, and by the supports to the railway necessary to be left below. The latter cannot yet be ascertained, and cannot be ascertained till Russell begins to work the minerals. After he does begin to work, he will be in the ordinary position of a mineral owner, and will get compensation from the Company. For that he is bound to be prepared, and cannot make it a complaint against the sellers; and the damages which they are liable in may come to be merely the difference between what the Company may have to pay to him, and the extra claim against the sellers. I am of opinion, therefore, that if he can establish by a report of persons of skill that he must now begin his operations at a loss, he is entitled to do so now, as well as to have his general decree for liability. It is possible that he can at present instruct great damage from the mere obstruction of the line on the surface. But if, on the other hand, it cannot be ascertained till after the coal is worked, the damages cannot be now assessed. No doubt it is a hard result, that a purchaser in this position must lay down the full price, trusting to a claim of damages at a future time, when his authors may be insolvent. At all events,

Feb. 25. 1853. *Russell v. Malcolm, &c., and v. Cal. Rail. Co.* it is clear that he is entitled now to have a decree, finding these parties liable in the damage which he may sustain from the loss of this portion of the surface, and the interruption to continuous use of the same. The only other question is raised by the action against the Company by the sellers. The real object of their conclusions is, to have it found that these parties were entitled to convey to Russell as if no occupation had been given to the Railway at all. This is excluded, as regards the two who actually sold to the Company, by their own unlimited conveyance; and, as to the others, they allowed Russell's right to remain a mere personal obligation, which could not affect a *bona fide* onerous singular successor, and the intervening sale to the Company entirely barred the possibility of making Russell's right effectual. The Company, however, were *in bona fide*, and I think they ought to be assoilized, but in such terms as to prevent the judgment from being founded on as narrowing Russell's right to the whole damages he may be able to claim under the statutory reservations in favour of mineral owners.

The Court therefore pronounced these interlocutors. In *Russell v. Malcolm and Others*:—Find that originally the lands of Alleysbank, including the coal and minerals within the same, which had not then been separated into a distinct estate, belonged to the defender Margaret Auld (now deceased, and represented by her husband the defender, John Malcolm) and to her sister Marion Auld, to the extent of two-third shares *pro indiviso*; and to the defender, Henry Wardrop, and his sister Mrs Muller to the extent of the remaining third share *pro indiviso*. Find, that by disposition in 1844, the said Margaret Auld and Marion Auld, sold and conveyed their two-third shares of the said lands of Alleysbank to the said Henry Wardrop; but that in the said disposition they “expressly provided and declared, that the whole coal and other metals and minerals in the said lands, our shares of which lands are thereby disposed, and also in that part of the lands of Alleysbank, some time ago sold to the said James Pinkerton, junior, are hereby reserved entire to the said Margaret Howie Auld or Malcolm, and Marion Auld, and to the whole other *pro indiviso* proprietors thereof, and our and their respective heirs and successors; and that we and they, and our respective foresaids, shall accordingly have full power and liberty as now and formerly possessed by us, at any time we or they may think proper, by ourselves, our tacksmen, or servants, to sink pits, and perform all other necessary operations on any part of the said lands, our shares whereof are hereby disposed, for working and taking away the said coal, and other metals and minerals in the whole of the said lands of Alleysbank, including the said portions thereof, sold to the said James Pinkerton, junior, as aforesaid, as well as the portions thereof, our shares of which are hereby conveyed, as also to let or sell our and their shares of the said coal, metals, and minerals at pleasure, and that upon payment always of the whole damages which may be occasioned by working out and carrying away such minerals, or other operations therewith connected, to the said lands or to the houses built or to be built thereon to the said Henry Wardrop, and the other proprietors thereof for the time”—Which provision and declaration is accordingly as a real burden and quality of his right *totidem verbis* inserted in the instrument of sasine expedé by the said Henry Wardrop upon said disposition, which instrument is dated, and was duly registered in the Register of Sasines on 3d September 1844. Find that

the defenders, as owners of the coals, metal, and minerals, thereafter by articles Feb. 25. 1858. of roup dated on the 17th, 22d, and 25th days of November 1845, and by minute of sale dated 26th November 1845, after competition of public roup, ^{Russell v. Malcolm, &c., and} sold to the pursuer the whole coal, metals, and minerals under the lands of ^{Malcolm &c. v.} Alleysbank, with an obligation to grant a clause of absolute warrandice, and Cal. Rail. Co. under the conditions contained in the 8th section of the articles of roup—‘The person preferred, or his heirs and successors, shall have the right and privileges, and shall be bound in working the said coal, metals, and minerals, to observe the conditions, and implement the obligations contained in the following rules and regulations, which shall be binding upon him and them, from the date of the minute of preference, and which shall be introduced into the disposition to be granted to him, the instrument of sasine to follow thereon, and in all the future conveyances and transmissions of said coals, metals, and minerals, as real liens and burdens, or otherwise the same shall be void and null, viz. —First, He shall have right to win the coal, metals, and minerals, and to work out the same in any manner he may consider most beneficial. He shall be entitled to work them from any pit or mine in the adjoining lands, to which he may have, or shall acquire right, or by pits and shafts in and upon the said lands themselves, and he shall accordingly be entitled to sink pits, and erect all necessary engines, machinery, and houses, in and upon any part of the said lands, excepting that part thereof sold to James Pinkerton, junior, farmer, near Rutherglen; and to make roads, water courses, and ponds, and in general to use the surface of the said lands, excepting, as before excepted, for all necessary operations in working, storing, and carrying away the said coal, metals, and minerals. He shall have power and liberty at any time to take down the said buildings, and to remove and carry away the materials thereof, and also to take down and remove the engines, machinery, and appurtenances which may be erected and fitted up on the said lands, in so far as the same shall not be subject to any right of lien or hypothec for payment of the price, or any balance or interest thereof. The person preferred to the purchase and his foressaids, shall be bound to pay to the proprietors for the time, a yearly rent at the rate of £10 for each acre imperial measure of the surface of the said lands, which shall be broken up, or entered upon, or occupied by him or them, or which shall be deteriorated or injured by pits, or by sinking, or by any effect or other circumstances of working the said coal, metals, or minerals, and that half-yearly, at Martinmas and Whitsunday, during the period the surface shall be occupied by him, or shall remain in an injured state, and when he shall cease to occupy the said surface, he shall be bound to restore the same to a good arable state and condition, and to pay the rent thereof, and of such part of the surface as shall be injured, in manner foressaid, until the term of Martinmas, after it shall have been restored to an arable condition. Fourth, the person preferred and his foressaids, shall be at liberty, in case it shall be necessary, to carry off any water that may arise in the course of the working of the said coals, metals, and minerals, by or through the said lands of Alleysbank, belonging to the said Henry Wardrop and Janet Marion Alexander Wardrop or Muller, by means of proper conduits, and in such way and manner as shall be least prejudicial to the said lands, they being always bound to pay all surface damage that may be occasioned to the said lands by

Feb. 25. 1853. their operations in transferring or carrying off such water, and further, under the declaration in the minute of sale, "The coal, metals, and minerals referred to in the foregoing articles upon the foregoing terms and conditions, are now exposed at the upset price of £5000—Declaring that the period of working the said coal, metals, and minerals, is extended to thirty years from and after Whitsunday next, 1846, and the period of removing and restoring the surface, altered and extended accordingly. And declaring farther, that it is intended by the foresaid articles that the purchaser, in respect of the payment to the landlord of L. 10 per acre, per annum, (per imperial acre,) shall be freed from all claim at the instance of the tenant of the surface for all damage sustained by him, in so far as regards the grounds occupied or used by the purchaser, excepting the claims of the landlord and tenant for the damage or deterioration of crop or ground, and the purchaser's obligation to restore the ground in manner therein mentioned, it being expressly understood that the purchaser shall not be entitled to occupy, use, or take any part of the surface, except for the purpose of working out the said coal, metals, or minerals." Find, that after the pursuer bought the said coal, metal, and minerals, with the aforesaid rights and privileges in regard to the use of the surface, the defenders did not proceed to perfect and complete the right which they had so sold to the said Archibald Russell by conveyance and infeftment, so as to give him any feudal right in and on the surface of the said lands, in terms of the said articles of roup, and the said minute of sale, which could be effectual against any singular successor acquiring, by onerous and *bona fide* purchase, the right to the said lands, or any portion of the surface of the same, and that they left the right so sold to the said Archibald Russell, on the personal obligation undertaken by them. Find that the Railway Company in this state of things, gave notice to the late Henry Wardrop and Mrs Muller, under their statute, of their purpose to take the portion of the land in question for the formation of the railway, and thereby acquired right to the same, the price of which they afterwards settled by agreement, and paid to the said Henry Wardrop and Mrs Muller, and obtained possession of the right to, and occupation and possession of, the said portion of the surface for the purpose of their railway. Find, that after the right and occupation so acquired under the railway notice, and completed by feudal investiture and possession, the defenders cannot give the said Archibald Russell the possession and use of the whole surface of the lands for the purposes and to the extent agreed to, and warranted in the said articles of roup and minute of sale. Find, that the right so acquired by the Railway Company cannot be contracted and limited by any personal contract which the said defenders may have entered into, such as that with the pursuer, and therefore that in so far as the rights acquired by the said Archibald Russell, by purchase from the defenders, are more valuable and extensive than the ordinary rights competent to mineral owners, against the owner of the surface, for the use of the same, so far as necessary for the use of the minerals, or more valuable than can be made effectual under the Railway Clauses' Act. Find that the defenders cannot make such rights effectual in favour of the said Archibald Russell against the Railway Company. Find that the right acquired, as aforesaid, by the said Archibald Russell was much more extensive and valuable than the rights competent at common law by a mineral owner against

the proprietor of the surface. Therefore, Find that the pursuer, the said Archibald Russell, is entitled to claim damages for the loss he has sustained or may sustain, in respect that the defenders failed to perfect and complete, by feudal investiture, the right they sold to him of the use of the said surface, as described in the said articles of roup and minute of sale, and cannot now give him possession of the right to the said use of the surface so as contracted for and bought. Find the defenders liable in reparation to him of such loss and injury as he can instruct therefrom, and decern. Find that the said pursuer is entitled, if he can, now to instruct that he cannot begin to work the coal in the way most beneficial to himself, owing to the injury caused by the interruption to the continuous use of the surface, or that he from the first must sustain loss and damage in any way from the said cause, and that if such damage can now be instructed, he will be entitled to recover the same from the defenders, reserving to them any claim of relief, if any, competent to any of them, against the others in the circumstances. Allow the said Archibald Russell to give in a minute, stating whether he proposes now to instruct any loss and injury to him, and what, which he avers has been caused by the loss of the said portion of the surface acquired by the Railway Company, before he begins to work the said coal and minerals, and in what way he proposes to establish such loss and injury. Find that if such loss and injury cannot now be instructed before he begins to work the said coal and minerals, or to the extent to which the same cannot now be ascertained and estimated, he will be entitled after the workings have proceeded, and the extent of the injury, if any, is then ascertained, which the loss of the use of the portion of the surface taken by the Railway Company may occasion, to recover the same so far as the same cannot now be compensated, from the defenders, and so far as the same will not be compensated and covered by the damages or price which the Railway Company may have to pay under the Railway Clauses' Act, after the workings have proceeded,—which claims of the pursuer are hereby fully reserved against the defenders.

And in the action against the Railway Company, as follows :—"In respect of the judgment of the Court, pronounced in the action at the instance of Archibald Russell against the principal pursuer in the present action, assoilzie the defenders and decern, without prejudice to the claims which the said Archibald Russell may competently state and instruct as a mineral owner, under the Railway Clauses' Act, against the said defenders ; Find the defenders entitled to expenses ; allow an account thereof to be given in, and remit to the Auditor to tax and report ; but in so far, as the said Company may call on the said Archibald Russell to pay any part of the said expenses, Find that the other principal pursuers must free and relieve the said Archibald Russell of the expenses he may be so called on to pay, and find the other pursuers liable in repetition to him of the same, and decern ; and find, that on being called on to pay the same, he will be entitled to obtain at the expense of the other pursuers, an assignation to any decret or diligence the defenders may have obtained to enforce payment of the expenses due to them, and to insist in and enforce the same against the other pursuers for his relief and indemnification ; also, find the said Archibald Russell entitled to obtain from the pursuers of the action against the Caledonian Railway, any expense,

Feb. 25. 1858. which, on enquiry, may be found more properly incurred by him for his own protection in the action raised with his concurrence : allow an account thereof to be given in, and remit to the Auditor," &c.

Russell v. Malcolm, &c., and Malcolm &c., v. Cal. Rail. Co.

J. F. Wilkie, Agent for Russell.

J. W. McKenzie, and Lockhart, Morton, and Co., Agents for Malcolm, &c.

Hope, Oliphant, and Mackay, Agents for Railway Co.

(W. H. T.)

No. 132.

PETITION, MISS E. E. D. V. G. MUIRHEAD.

Entail—Statute 10 Geo. III. c. 51—Improvements on Estate.—Held that the expense of building a porter's lodge, and of the introduction of water into an existing mansion house, filling up a quarry and preventing slips of earth at a bank, are improvements falling within the provisions of the Montgomery Act ; but that the expense of providing mill stones is not of the nature of a permanent improvement.

2d Division.

Feb. 25. 1858.

Petition.
Muirhead.

This was a petition at the instance of the heiress of entail in possession of the entailed estate of Bredisholm, with consent of her curators, for authority to lay out L.200 derived from the "sale or disposal" of a portion of an entailed estate :—1st, in permanently improving the same ; and, 2d, in repayment of money already expended in such improvement, as authorised by 11 and 12 Vict., c. 36, sec. 26, "or such other sums as may be ascertained . . as the proper amount of expenditure in said improvements already made or to be made, as aforesaid."

After intimation, the Court remitted to James Hozier, Esq. of Newlands, "to examine and report whether the *proposed improvements* on the mansion house, and the building of a porter's lodge, are proper and permanent improvements, and such as are contemplated by the statute 10 Geo. III., c. 51."

Mr Hozier reported favourably with regard to the proposed improvements on the mansion-house of Bredisholm. As to the porter's lodge, he reported that it was indispensably necessary, being "in the centre of a very large and mining district," and there being "no house for a forrester or servant of that description." Owing to the mining operations on the estate of Bredisholm, the supply of water for the use of the mansion house had been cut off ; and Mr Hozier reported that a supply could be got, and recommended it to be taken from a certain spring, and that he considered the sum of £200 claimed, was inadequate, and recommended that the petitioner, and her curators, should be found entitled to £398, 10s., to meet future improvements.

Upon considering this report :—

The LORD JUSTICE-CLERK, remarked that a porter's lodge was not, under the Montgomery Act, a permanent improvement, and that he did not incline to go beyond what that statute allowed ; while taking water into the mansion house could not be under the Montgomery Act.

Mackintosh, for the petitioner, referred on the first point to *Fraser*, 2d Dec. 1835, 14 Shaw, 899, (the Lovat improvements), where a milk house, ice house, &c., were allowed ; and to *Craufurd Torrance*, 2 W. and S. 429, 1st Dec. 1820, F.C. ; where the Court, among other improvements, sustained a garden house, and though this case was reversed on appeal, it was only on the ground that the procedure under 10 Geo. III., c. 51, had not been regularly gone through. See *Lord Gifford's* speech, p. 437. Then as to the

introduction of water into the mansion house, in the case of *Fraser*, (*supra*), Feb. 25. 1853. the introduction of water had been allowed. Under the words in the prayer, the Court had power to find the petitioner entitled to the sum reported by Mr Hozier, in conformity with *Gordon*, 16th July 1851; reported 12th Nov. 1851, 14 D. p. 16. Petition,
Muirhead.

The LORD JUSTICE-CLERK, was clear, that under this petition, the petitioner was entitled to payment of the sum ascertained as above, notwithstanding the indication of an opposite opinion in the First Division in a similar case. *Lady Jane Hamilton*, 14th July 1852, *ante*, vol. I., p. 1043.

The other Judges concurred.

The following interlocutor was pronounced:—"The Lords having considered the report of Mr Hozier, approve of the same; Find that the building of the porter's lodge, and gates, bringing in water into the mansion house, and the repairs and alterations on the mansion house, as reported by Mr Hozier, and for which an estimate, amounting in all to L.398, has been got, will be permanent improvements on the estate; and authorize the same to be executed; and sanction the payment of the same, out of the money consigned, as mentioned in the petition: But before granting warrant for uplifting any portion of the said money, Remit to Mr Hozier, and request him to give such directions for the execution of the same, as he may deem necessary, either on the estimates already obtained, or on any others which he may obtain, and when the same are executed in a proper and substantial manner to his satisfaction, and sufficient discharges produced to satisfy him of the amount actually expended, to report finally to the Court, in order that warrant may be granted for application of part of the consigned money to repay the said outlay."

As to the improvements *already executed*, the Court remitted, of this date, (8th Dec. 1852,) "to Mr Scott, of Craiglockart, to report as to the improvements already executed, whether the sums stated have been *bona fide* and usefully expended in permanent improvements on the entailed estate of Bredisholm, and whether they have been substantially, and well executed, and may be sustained on such grounds: And remit to Mr Barston, accountant, to report whether the sums stated are duly and sufficiently vouched by proper evidence, proving the outlay to be such as averred."

In compliance with this remit, Mr Scott, reported that of the sum of L.510, 8s. 5½d., L.487: 19: 3, were *bona fide*, and usefully expended in permanent improvements on the entailed estate of Bredisholm, and have been substantially and well executed, and may be sustained on such grounds.

Mr Barston, as an accountant, reported the sums stated as "duly and sufficiently vouched by proper evidence, proving the outlay to be such as averred."

Amongst these improvements was a sum for filling up a quarry, and also for preventing slips of earth at a bank, and also the expense of providing mill-stones.

The LORD JUSTICE-CLERK objected to the item of the mill stones, as not a permanent improvement.

Feb. 25. 1853. *Mackintosh*, for the petitioner, stated that they had been reported to last for from sixteen to twenty years, which was longer than the purchase of house property; that it was a part of the machinery of a mill which the estate was bound to keep up, and not the individual proprietor, and that the case of *Lockhart*, D. 14, 922, was a case of refitting a mill in similar circumstances.

Petition,
Muirhead.

The LORD JUSTICE-CLERK. The Court only consented to allow the fittings in that case on condition of the premises being insured. This is not properly a permanent improvement.

With regard to the other items, a further report was ordered, and to-day the case was again called, and the following interlocutor pronounced:—"The Lords having resumed consideration of the petition for Miss E. Du Vernet Grossett Muirhead, and her curators, together with the reports by Alexander Scott and Charles Barston, and the additional report by Alexander Scott, approve of the said reports, and also of the said improvements already executed, as therein reported, under the deductions of L.22:9:2, therein disallowed, as temporary improvements, and of L.12, being a proposed charge for mill stones, leaving for permanent improvements already executed, the sum of L.475:19:3. Grant warrant to the accountant of Court to exhibit the deposit receipts, and authorise and ordain the Royal Bank of Scotland to pay the said sum of L.475:19:3, as prayed in the said petition, and decern."

L. Mackintosh, S.S.C., Petitioner's Agent.

(J. S. M.)

No. 133.

HUNTER v. WALKER.

Bankruptcy—Sequestration—Stat. 2 and 3 Vict., c. 41, § 11—Preference, vouchers of—Dividend.—The trustee on a bankrupt estate is not entitled to reject a claim to a preference in the ranking, on the sole ground that the vouchers of the preference were not lodged along with the oath, the necessary evidence of the debt itself having been produced.

1st Division.

Feb. 26. 1853. The appellant, Hunter, along with Scott and Duncan, signed, as cautioner for Campbell, a cash credit bond to the Eastern Bank, on which, a balance having become due, the Bank used inhibition against Campbell. More than year and day thereafter, Campbell was sequestrated. Scott's trustees having paid the debt to the Bank, and got assignation to the bond and diligence, Hunter paid to them his third of it, amounting to £173:16:1, and lodged a claim to be ranked for that sum on the bankrupt's estate, (which consisted of the proceeds of heritable property), preferably to those creditors whose debts were contracted subsequently to the inhibition, which was specified in his claim, and to which he therein alleged he had right. With his claim he produced only the cash credit bond, the assignation by the Bank, which narrated the inhibition, and the voucher of his payment to Scott's trustees. The trustee, however, rejected it on account of the non-production of the inhibition, and of any assignation to it in the claimant's favour; but he admitted him to rank for an ordinary dividend. Against this deliverance, Hunter appealed to the Sheriff, tendering at the same time, as productions, the inhibition, and an assignation thereto, which he had procured with great difficulty from the agent for Scott's trustees, who also acted as agent for the trustee and creditors. The Sheriff-substitute, on 29th June 1852, refused to receive these

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Walker.

documents; and, on 23d November thereafter, "in respect the inhibition and assignation thereto were not produced at all before the trustee, when his deliverance was pronounced, and in respect said inhibition and assignation are not now before the Sheriff-substitute, finds that there is no evidence to support the appellant's claim of preference, and therefore adheres to the trustee's deliverance." Feb. 26. 1853.
Hunter v.
Walker.

Against these judgments, Hunter brought the present appeal.

P. Fraser, and Patton, for the appellant. Section 11 of the Bankrupt Act applies only where the vouchers of the debt are not produced with the claim, and not to documents instructing a preference, which is a mere quality of the debt. The trustee ought to have set apart the dividend till the requisite evidence was produced. In cases like this, the Court have relaxed their strictness, *Douglas v. Sanderson*, 29th February 1848.

T. Mackenzie, and Neaves, for the respondent, Campbell's trustee. Section 11 of the Act provides, "that the creditor shall produce with his oath such accounts and vouchers as shall be necessary to prove his debt," *Wright v. Corrie*, 19th November 1842; *Ker v. M'Ewan*, 8th February 1845; *Taylor v. Drummond*, 11th January 1848; *Holiday v. Harvie*, 11th July 1848.

The term "debt" in this section means debt as claimed.

LORD PRESIDENT. I think this appeal rightly taken. It was the trustee's business to have called for production of this evidence had he desired more knowledge, and not to have rejected proof altogether. Nor can I overlook the fact, that the documents were in the hands of his agent, who threw obstacles in the way of their production.

LORD FULLERTON. I am of the same opinion. The trustee ought to have waited till he saw if Hunter was able to produce the writs. Such delay is competent, unless there are statutory provisions against granting it, and I do not think that the "debt" of § 11 means "preferable debt."

LORD IVORY. The inhibitor was entitled to produce evidence *quocunque tempore*, before payment of his dividend. If a trustee divide in the face of a recorded inhibition, he would undertake great responsibility.

LORD CUNINGHAME. I am clear that the objection is founded on a narrow and hypercritical construction of the statute, for which there is no precedent in similar circumstances. The terms of the documents lodged necessarily showed in whose hands the inhibition was, in which case the trustee should have appointed a dividend to be set aside to meet the appellant's claim, when he could complete his productions. He must have known the basis of the claimant's preference to be indisputable.

The COURT "recall the several interlocutors and deliverances appealed from, and remit to the Sheriff, with instructions to receive the documents tendered by the appellant, but rejected by the Sheriff-substitute, as well as all other documents necessary to ascertain the rights of the appellant, and thereafter to dispose of the appellant's claim in terms of the statute, and decern. Find Thomas Walker, the present trustee, liable to the appellant in the expenses incurred by him both in this Court and in the Inferior Court down to this date," &c.

Walker and Melville, W.S., Appellant's Agents.
James Morgan, S.S.C., Respondent's Agent.

(J. S. M.)

No. 134.

GILMOUR AND MOAR v. CLARK'S TRUSTEE.

Carriage of goods—Contract—Deviation from instructions—Sea Risk—Loss—Liability.—
A carrier was instructed to ship certain goods on board a particular vessel ; but he shipped them on board of another vessel for the same destination. The vessel foundered at sea, and the goods were lost :—*Held*, that the goods were lost through his deviation from his instructions, and that he was liable to refund their value.

1st Division.

Feb. 26. 1853.

Gilmour, &c.
v. Clark's
Trustee.

In this case, the question to be determined related to the liability of a carrier for the loss of goods which he had been instructed to ship on board a particular vessel, but which he shipped on board another vessel which foundered at sea. The action was raised originally in the Sheriff Court, where proof was led. By the final interlocutor, now pronounced in the cause, it was held established, that George Urquhart, the carter who took the goods in question to Leith, sometimes acted for himself and sometimes for George Clark, carrier, the original defender in the cause ; that on the occasion in question he acted for Clark ; that express instructions were given to Urquhart on the part of the pursuers, Gilmour and Moar, to ship the goods for Stromness, by a vessel named the 'Earl of Zetland,' of which the pursuers were part owners, whereas he shipped them by another vessel named the 'Magnet ;' that there was no sufficient excuse for this deviation from the instructions given, the vessel, named the 'Earl of Zetland,' being at the time still in the dock, and no sufficient pains having been taken by Urquhart to make proper inquiries for it ; that there was no acquiescence by the pursuers in this deviation from their instructions, and that there is no evidence that the pursuers' receipt-book—in which delivery of the goods to the captain and mate of the 'Magnet' was acknowledged, and upon which the defenders founded to shew that the pursuers on receiving it must have been made aware that the goods had been shipped, not by the 'Zetland,' but by the 'Magnet'—was looked at by the pursuers, and that although looked at, its tendency was only to mislead, and not to instruct them as to the truth, the shipment being there described as made in the 'Earl of Zetland ;' that it is admitted that the vessel, the 'Earl of Zetland,' arrived at Stromness in safety, but that the 'Magnet,' foundered at sea, and that the goods belonging to the pursuers were lost in her.

In these circumstances, an action was brought in the Sheriff Court, at the instance of Gilmour and Moar, against Clark, concluding against him for L.50 : 16 : 11, the alleged value of the lost goods.

The Sheriff-substitute decerned against the defender for L.45 : 14 : 4, as the ascertained value of the goods, with expenses, to which judgment the Sheriff adhered.

The defender, Clark, advocated the cause ; but having since died, his estate was sequestrated, and his trustee now appeared in his stead.

Gifford, and the *Dean of Faculty*, for the advocator, referred to *Hammond & Co. v. Porteous*, 13th Dec. 1808. This is a sea risk for which Clark was not liable, *Heseltines v. Arrol & Co.*, 15th Jan. 1802, M. 10,111.

Fraser, and *G. G. Bell*, for the respondents, (pursuers), referred, in support of their claim, to *Paley on Principal and Agent*, p. 3 ; *Story on Agency*, p. 153 ; *Bain v. Brown and Blackburn*, 4th Dec. 1824, 3 S. and D. 362 ; *Harte v. Ogilvie*, 24th Jan. 1749, M. 10,095.

The LORD PRESIDENT, (after going over the evidence in the cause.) The Feb. 26. 1853.
 question which now arises, and which I think is attended with more difficulty ^{Gilmore, &c.}
 than the question on the facts of the case, is, what is the legal consequence of ^{v. Clark's}
 this? The goods are lost. The question is, whether this peril of sea is what ^{Trustees}
 the party who deviated from his instructions is responsible for? It is stated
 that the merchant ought to have insured his goods, and that the party is not
 responsible for loss thence arising. Two cases were cited on the part of the
 defender. But I cannot say that these cases come up to the point we have
 here, for there was not there an express instruction to send the goods by a
 certain vessel. It does not follow that a party is bound to insure where
 he has given express orders to send the goods by a particular vessel in which
 he may have confidence, as well as in the seamanship of the parties who navi-
 gate it. In the case of *Harle v. Ogilvy*, the opinion of Lord President
 Dundas bears on this case a good deal. But there the instruction was to send
 the goods by a convoy, plainly to prevent the chance of capture, and as no in-
 jury arose from capture, there was no liability. If there had been instructions
 to send it by a particular vessel and master, I think his opinion would have
 been different; and therefore, upon the whole, I am inclined to adopt the view
 of the Sheriff in this case.

LORD FULLERTON. I cannot say that I am inclined to depart from the con-
 clusion to which your Lordship has arrived, although I must say that of all
 the cases that ever came before us, this is the most severe for the carrier and
 mandatory. The principles on which we decided these cases were never
 carried so far in any case before, and I think it amounts almost to a penal
 infliction. But we must deal with the case according to the rules of evidence;
 and the rules of law, for we must consider these points as entirely distinct. I
 cannot help thinking that the pursuer has suffered material injury by having
 the case decided in this way, instead of having it sent to a jury. But we can-
 not deal with the case in this way. It so happens that the question of law
 and the question of fact admit of being discriminated. They are not only
 distinguished but completely separate, and therefore we must inquire first
 whether there is sufficient evidence to enable us to hold that Urquhart did get
 sufficient instructions to deliver the goods to the "Earl of Zetland." Now the
 allegation is that the "Earl of Zetland" had sailed. There is no good evidence
 of that. As to acquiescence, I agree there is no proof of it. It may have
 been possible for the pursuers to have got information that the goods were on
 board the "Magnet," and not the "Earl of Zetland," but there is not sufficient
 evidence to enable us to hold that the pursuers were apprised of this, and that
 they acceded to it.

The question then arises, how we are to deal with the question of law?
 Now that is a nice point; for the proprietors of the goods seem to have given
 directions that the goods should be sent by the "Earl of Zetland," not be-
 cause it was a more seaworthy vessel; all that they say is, that they preferred
 it because they were part owners. But undoubtedly had the goods been sent
 by the "Earl of Zetland," they would not have been lost. Now the damage
 which arose, *de facto*, arose from violation of the orders that Clark had
 received. Is he liable for all the damage that may *de facto* arise in this
 way? I do not know that there has been a case in which it has been carried

Feb. 26. 1853. so far. But the safe principle of law is to hold that the party who accepted the carriage of the goods is bound to follow his instructions, and that if loss arises he is to be liable for the consequences.

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LORD CUNINGHAME. I am quite satisfied that any mistake committed in the despatch, was not from the fault of the pursuers; the defender is liable for the price of the goods in dispute. There appears to me to be sufficient proof that Urquhart, in the transport of the goods from Edinburgh to Leith, acted on the employment of the defender, who must consequently be liable for Urquhart's mistake.

LORD IVORY. I am of the same opinion. If the party had not failed to implement his instructions, the goods would have been saved, and the question of law therefore results into a very narrow one. There has been loss. Who is to sustain it? It is an invariable rule in such cases that the loss shall fall on the party most in fault, and therefore I am of opinion that the judgment of the Sheriff is correct.

The COURT therefore, "Find that as the employment given and accepted of, was to ship the goods in a particular vessel selected by the pursuers, and under the charge of a known master, and as the goods if so shipped would not have been lost, the original defender Clark, as responsible for Urquhart, was liable to make reparation to the pursuers for the loss thus sustained by them in consequence of Urquhart's unwarrantable deviation from the instructions given; Therefore, and with reference to the procedure before the Sheriff as to the value of the goods, repeat the judgment of the Sheriffs, and decern against the compeerer William Ker Aitchison, as trustee for the late George Clark the original defender, for the sum of £45 : 14 : 4½, with interest from the date of citation in the Inferior Court to the date of sequestration, to the effect of the pursuers ranking upon the sequestrated estate of the original defender, for the said sum and interest, and decern against the said William Ker Aitchison personally, and as trustee foresaid, for payment of the taxed expenses in the Inferior Court, being £53 : 3 : 1 : Farther find him liable in expenses in this Court, and remit to the Auditor to tax the same and to report."

Alexander Gifford, S.S.C., Advocator's Agent.

James Nisbet, S.S.C., Respondents' Agent.

(J. S. M.)

No. 135.

WATSON v. WELSH.

Poor Law Amendment Act, 8 and 9 Vict., c. 83, § 65—Poor House—Pauper—Parochial Board—Sheriff Court—Incompetency.—Under sanction of the board of supervision, the parish of A., having a poor house, agreed to accommodate certain paupers belonging to the parish of B., which had no poor house, but to which it was not contiguous, or in any way connected:—*Held*, that an application to the Sheriff by a pauper belonging to B., refusing to go to the poor house of A., and claiming right to receive relief, and still to reside in her own parish in B., was incompetent.

21 Division.

Feb. 26 1853.

Watson v.
Welsh.

This was an advocacy from the Steward of Kircudbright of a petition at the instance of Rosie Watson, an infirm old woman, against the inspector of the poor for the parish of Troqueer. She had been found several years ago to be a proper object of parochial relief, and for some time received 7s. per month from the parish of Troqueer, as such. The parochial board of that parish having made arrangements for the admission of paupers into the Kircudbright

union poor house, with the sanction of the board of supervision, under the ^{Feb. 26. 1853.} 65th section of the Poor Law Amendment Act, intimated to the advocate that she must consent to go into that poor house, or lose the assistance hitherto afforded to her. The parish of Troqueer does not belong to the Kircudbright union, nor is it contiguous to it. Watson v. Welsh.

She then raised the present action before the Steward, to have it found that she was entitled to refuse to go into the poor house, and that the parish of Troqueer must still continue to afford her relief at her own home.

The Steward dismissed the application, holding that his jurisdiction was excluded from such matters, there being a substantial offer of relief to the pauper, who complained only of the *mode* in which it was proposed to be given, but reserving the petitioner's right to apply to the board of supervision.

The petitioner advocated, and the Lord Ordinary, (Robertson), adhered.

The petitioner reclaimed, for whom *Maidment* contended, that the petitioner was not of the class of persons for whom poor houses were erected. She had no friend able to support her, but she had a daughter whose presence was essential to her comfort. She was not, therefore, "friendless" in the sense of the 60th section of the Act. Moreover, the poor house of the Kircudbright union not being connected in any way with the parish of Troqueer, was not a poor house, *quoad* the parish, in the sense of the Act.

Hector, for the respondent.

The LORD JUSTICE-CLERK. The 65th section of the Act allows the parochial board of a parish or combination having a poor house, to receive into it poor persons belonging to *any other* parish. This has been done here under the sanction of the board of supervision. No hardship is inflicted. I therefore coincide with the Lord Ordinary's judgment.

The other Judges concurred.

The COURT "adhere."

R. Arthur, S.S.C., Petitioner's Agent.

Jopp and Johnston, W.S., Respondent's Agents.

(W. H. T.)

GIFFORD v. ROBERTSON or RENNIE.

No. 136.

Wife's separate provision—Accounts in rem versam.—An agent employed by a married woman to take steps to protect a separate alimentary provision belonging to her, is entitled to decree for his account against her personally, as *in rem versam*.

Reference to Oath.—On a reference to oath, the defender having admitted the employment, and the non-payment:—*Held*, that the creditor is entitled to instruct the various items of his account *aliunde*.

This was an action for payment of a business account alleged to have been incurred in the employment of the defender, Mrs Robertson or Rennie, for the protection of her own rights, and those of her children, relative to a separate alimentary provision, over which the *jus mariti* of her husband is excluded, and of which she is *liferentrix*, and her children are *fiars*. Defences were lodged denying employment, and pleading prescription, and the record being made up, reference was made to the defender's oath, whether the accounts concluded for against her are resting owing to the pursuer. 1st Division.
Mar. 1. 1853.
Gifford v. Robertson.

The oath instructed employment, and also a written obligation on the part of the defender to discharge, by gradual instalments, the expenses which the

Mar. 1. 1853.
Gifford v.
Robertson.

pursuer had then incurred, or might yet incur on her behalf. The defender then "depones in explanation, that Mr Gifford, shortly after I sent him the letter above recited, declined taking any farther proceedings on my behalf, in consequence of my determination not to agree to a submission; and in consequence thereof, I considered Mr Gifford's proceedings as having been unavailing to me, and that I derived no benefit therefrom. Had Mr Gifford gone on with the proceedings on my behalf, and carried them to a conclusion; instead of deserting me at an important moment, whereby my opponents derived great advantage, and myself and family were exposed to great persecution and annoyance, I should have considered my promise binding, although not legally so. But in consequence of his refusal so to do, I considered myself absolved from the promise made in said letter."

The Lord Ordinary (Robertson), "in respect the oath and letters therein referred to, do not establish that the accounts sued for, were incurred, or were *in rem versam* of the defender, so as to constitute a debt against her separate estate: Finds the said oath negative of the reference, and therefore assoilzies the defender from the whole conclusions of the action, and decerns: Finds the defender entitled to expenses," &c.

Against this interlocutor the pursuer reclaimed.

Gifford, for the reclamer, argued that the oath having proved employment and non-payment, it was immaterial that the defender did not depone to the items, of which these accounts were made up, as these might competently be proved *aliunde*. *Stevenson v. Kyle*, 13th Feb. 1850, 12 D. 673. The oath instructed that the account sued for had been incurred in reference to Mrs Rennie's alimentary provision, and was therefore *in rem versam*, and warranted a personal decree against her. *M'Ara v. Wilson*, 15th Feb. 1848, 10 D. 707. *Greig and Morton v. Christie*, 16th Dec. 1837, 13 S. 235.

Maidment, for the respondent. The oath does not prove that the expenses specified in the accounts were *in rem versam* of the defender. It is incompetent to prove them *aliunde*, and therefore the oath is negative of the reference.

LORD FULLERTON. The oath shews that the business done related to the alimentary provision. Indeed, it is taken for granted, that the accounts are *in rem versam*, and the reference to oath is not with regard to that, but whether they are resting owing. I think the party has made out that the defender is liable for the debt.

LORD CUNINGHAME. I am of the same opinion.

LORD IVORY. This reference is confined to the account, so far as concerned Mrs Rennie's interest. The question is, whether, as against herself, there has been a constitution of liability, and an admission of non-payment. This oath, as I read it, and as it must have been understood by Mrs Rennie, contains an admission of employment to protect her interest. This being so, I do not inquire whether she was successful or not. It is sufficiently *in rem versam* of the party, if she has had defences lodged and her interest protected. She adopts all that was done, and yet she says, that having obtained all this benefit, she is not to be held liable to pay. The only question the Court has to deal with is, whether they will give decree constituting the debt against

her; and on this point I have no hesitation. This appears to be merely an attempt to avoid a just liability. Mar. 1. 1853.

The LORD PRESIDENT. I am not disposed to differ as to recalling the inter-locutor; but I do not think we are in a condition to pronounce final judgment in the case. I am clear that we are entitled to deduce the conclusion that the proceedings were *in rem versam*, so far as necessary to support this claim, and that the oath is affirmative of the reference. Gifford v. Robertson.

The COURT therefore recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to ascertain the exact amount due.

Alexander Gifford, S.S.C., Pursuer's Agent.

John Robertson jun., S.S.C., Defender's Agent.

(J. S. M.)

FENTON v. GRANT.

No. 137.

Cautioner—Expenses—Judicature Act, sec. 40.—1. Terms of a cautionary obligation, and circumstances in respect of which it was held that a cautioner was not liable to the creditor for the expenses of discussing the principal debtor:—2. The 40th section of the *Judicature Act*, requiring findings in fact, is not limited to cases where *parole* proof has been led in the Inferior Court.

The pursuer let a mill and other subjects on lease to the defender's 2d Division brother, Peter Grant. The defender, Alexander Grant, in the missive of Mar. 1. 1853. lease, bound himself as cautioner, "to see the rents regularly paid during the period of the lease." The tenant having failed to pay the rent due at Martinmas 1842, the pursuer attached his machinery and other effects by sequestration. The tenant absconded, and the defender took possession of the subjects, through a person whom he placed there for the remainder of the lease, which does not appear to have been objected to by the pursuer. The pursuer, however, raised a small debt action before the Sheriff of Banff, against the defender, as cautioner, for the rent due. The defence that he was entitled to the benefit of discussion, appears to have been urged, and the action was not insisted in. The pursuer upon this, raised an action in the Sheriff Court of Forfarshire, against the principal debtor, who had fled to that county, and, after some litigation, obtained decree for the rent, and expenses of process, but did not succeed in getting payment. He then raised the present action in the Sheriff Court of Banff, against the defender, as cautioner, concluding both for the principal sum, and for the expenses of the action against the principal debtor. Fenton v. Grant.

The Sheriff found that the principal debtor had been sufficiently discussed, and decerned against the defender for the whole sum claimed. A proof was led in the Sheriff's Court, referring chiefly to the occupation of the subjects after the absconding of the tenant.

The defender advocated, and the Lord Ordinary (Anderson), on the 14th December, adhered as far as regarded the principal sum, but altered the judgment, in so far as it found the defender liable for the expenses of discussing the principal debtor.

The pursuer reclaimed.

This judgment of the Lord Ordinary contained no findings in fact, nor special findings in law, but simply expressed an adherence to the judgment of the

Mar. 1. 1858. Sheriff, and the Court remitted to him, "to pronounce the findings in fact and law, which seem to him to be necessary in terms of the 40th section of the Judicature Act, with power to his Lordship to repeat the interlocutor of 14th Dec. And delay taking up the reclaiming note until that is done."

Fenton v.
Grant.

The Lord Ordinary in obedience to this remit, pronounced an interlocutor with distinct findings in fact and law, and decerning as before, but added in a note, that as he looked upon the *parole* proof which had been led, as referring to matters not relating to the portion of his decerniture reclaimed against, he still doubted the necessity of the specific findings ordered.

For the pursuer appeared *Horn*, and *Dean of Faculty (Inglis.)* Cases of *M'Leod v. Allan*, 27th Feb. 1707, M. 2101, and *Logan v. Gibson and Kennedy*, 25th Nov. 1852.

For the defender, *Monro*.

THE LORD JUSTICE-CLERK. I am quite satisfied that the findings of the Lord Ordinary, under the statute, were necessary. The statute has not been limited to cases of parole proof. But the parole proof actually taken, bears very directly on the point at issue. While I concur in the ultimate interlocutor, my opinion is founded on the special facts. The general law which has been introduced is unnecessary for the decision of the case, and would require great consideration before being adopted. The case of *Logan v. Gibson and Kennedy*, is not applicable. It did not proceed on any general ground. The outgoing tenant claimed expenses against the cautioner, on the ground that the latter had adopted the incoming tenant's objections, and that the case was carried partly for him, and on his behoof. The incoming tenant resisted payment on the ground of fraud, which he said had been practised by the outgoing tenant to deceive the valuator as to the value of the stacks, by packing them with straw and stones. Until that objection should be disposed of, payment could not be enforced against the landlord. But when it was found to be groundless, it was contended that the landlord had up to the jury trial, really adopted the defence, and that the trial really took place for his behoof, and with his concurrence, as the true party. And certainly the landlord had been in the Inferior Court very incautious, and nearly committed himself. We thought, however, that on the whole he had not. But the question of the cautioner being by his allegation necessarily liable for all the litigation which the principal debtor might occasion, was not raised or decided. Much, in such cases, may depend on the general terms and nature of the guarantee, and there are mercantile cases in which I can understand that such expenses may fall within the object of the guarantee, without express mention of them. In this case the terms of the guarantee are—"binds himself to see the rents regularly paid during the period of the lease." Under this, the reclamer was clearly entitled to proceed directly against Alex. Grant, whenever the rent was not regularly paid. It was the cautioner's business to see that it was regularly paid; and if he averred payment, he was bound to produce the receipts. Under this cautionary obligation, if such it is, he had no other defence. I view it as a distinct contract, under which he was bound to produce the receipts as his only probation. I think the Sheriff was clearly wrong in the small debt Court, in ordering the prin-

principal party to be called first, and from the marking, I have no doubt that that defence was taken. The creditor was wrong in acquiescing in that decision. He ran the risk of that view being right. He should have brought his action against the cautioner, who was then in possession, the principal debtor having left the country, and being divested of the subjects. That is a very important fact in the case. The cautioner was in possession for his own relief, and there was a direct action against him, without proceeding against the original tenant. But I rest on the special terms of the guarantee, as the leading fact in the case.

LORDS COCKBURN and MURRAY concurred.

LORD WOOD. I have had some little difficulty in holding that the terms of this obligation place the defender in a different situation from that of an ordinary cautioner, so as to save the pursuer from the necessity of enforcing payment from the principal debtor. I am not satisfied that there was anything to prevent the defender, when sued in the small debt Court, from pleading that the principal debtor should be called, or to throw upon him any expenses which the pursuer might incur in constituting his claim against the principal debtor. In requiring this, he was only exercising the usual privileges of a cautioner, who is entitled to have the debt constituted against his principal, to be able to operate his relief against him; and I find no authority for holding that the expenses with which the proceeding may be attended, can be claimed from the cautioner, if not otherwise recovered. But your Lordship's construction of the obligation would seem to be the sounder one. It is appended to the missive of lease, and its terms would seem to amount to a *waive* of the benefit of constitution and discussion. The case of *Galloway*, 6th July 1825, seems to have a close resemblance to the present. If it was the right of the pursuer to proceed directly against the defender, without calling or discussing Peter Grant, I think, as he adopted that course at first, he ought to have adhered to it, in which case the expenses in question would not have been incurred; and if the defender suggested the discussion of the principal, I do not consider that it entitled the pursuer to give up his legal right, and then to look to the defender for reimbursement of the expenses occasioned. On the contrary, he was bound to disregard the suggestion, and go against the cautioner directly, (in the ordinary Sheriff Court, if necessary.) In not doing so, he admitted that the defender had the usual privilege of a cautioner, and acted on that footing. I apprehend, therefore, that the expense of proceeding against Peter Grant was the proper expense of the pursuer, as creditor, and does not fall under the cautionary obligation.

The COURT therefore "adhere."

Goldie and Dove, W.S., Pursuer's Agents.

A. Dunn, W.S., Defender's Agent.

(W. H. T.)

BATES AND BARING *v.* M'QUEEN.

No. 138.

Onus probandi—Pursuer or Defender in issue—Right of road—In an issue which put the question,—whether the public had for upwards of forty years, used a certain road through the pursuers' lands,—*held*, that the party claiming the right of road for the public, and offering to prove prescriptive use of it, ought to be pursuer, though he was defender in the action.

2d Division.

This was an action concluding for declarator that the pursuers had the sole right to the use of a certain road through their lands, and for interdict against the defender and all others from making use of the said road, or breaking down the fences which the pursuers might place across it.

March 1. 1853.
Bates &c., v.
M'Queen.

The defence was founded on prescriptive use of the road in question as a public road.

An issue having been agreed upon, putting the question, whether the road had been used by the public for forty years and upwards, the question came to be discussed, who ought to be the pursuer in the jury trial?

Ross, and the *Dean of Faculty (Inglist)*, for the pursuers, contended that the defender in the action ought to be pursuer in the issue. The title was here all on one side; the party wanting a title ought to prove his case. The whole *onus* lay with the defender. *Fergusson v. Sheriff*, 26th January 1844; *Colquhoun v. Douglas*, 26th July 1834; *M'Kenzie v. Davidson*, 26th February 1841; *Campbell*, 19th June 1851; *Cleghorn on Issues*, p. 603.

Pattison, and *Deas*, for the defender. *Forbes v. Morrison*, 19th July 1851; *Brand v. Charteris*, 3d January 1842.

The COURT decided that the defender, as the party on whom the onus of proving an affirmative lay, ought to be pursuer in this issue, guarding themselves, however, from being supposed to lay down an inflexible rule for all such cases.

Mackenzie & Baillie, W.S., Pursuers' Agents.

J. Rogers, S.S.C., Defender's Agent.

(W. H. T.)

No. 139.

ADDISON & SONS v. CRABB.

Act 2d and 3d Vict. cap. 41—Bankruptcy—Discharge—Concurrence of Creditors.—A bankrupt was sequestrated as an individual, and also as a partner of a company. The assets were all company assets; and there was no separate ranking on the individual estate. Certain creditors afterwards lodged new affidavits to rank on the individual estate, and signed a minute of concurrence to the bankrupt, presenting a petition for discharge as an individual, and also as a partner of the company, which petition was granted:—*Held*, that a creditor who had made no claim against the individual estate, was entitled to oppose the discharge, and that the general concurrence of the creditors not having been obtained to the discharge, the proceedings were irregular.

1st Division.

Mar. 2. 1853.

Addison and
Sons v. Crabb.

This was an appeal from the judgment of the Sheriff, approving of a discharge which had been granted to Crabb, a bankrupt, as a partner of a company, and as an individual. All the assets were company assets except a small sum belonging to the bankrupt's individual estate. This, however, had been added to the company funds and divided along with them. All the creditors who claimed, were company creditors, and there was no separate ranking on the individual estate. All the creditors of the company had given in affidavits for ranking on the company estate. None of them had made the deduction of the value of the company estate, required before voting on the estate of the individual partners; but their affidavits were quite in form to entitle them to rank on the individual estate, and either to rank or to vote on the company estate. Five of the creditors lodged with the trustee new affidavits, for the purpose of voting on the estates of the individual partners, valuing and deducting the liability of the company estate, and of the

other partner respectively, in terms of sec. 35 of the statute, and thereafter signed a minute of concurrence to the bankrupt, presenting a petition to be discharged as an individual, and also as a partner of the company. The trustee, thereafter, granted a certificate in the following terms :—

Mar. 2. 1853.

The Addison and Sons v. Crabb.

"I, James Gourlay, accountant in Glasgow, trustee on the sequestrated estates of the parties after named, do hereby certify that James Crabb, manufacturer in Glasgow, sequestrated under the bankrupt statute as an individual, and as a partner of Crabb and Brown, manufacturers in Glasgow, has, in my opinion, the concurrence to his petition for discharge of a majority in number and four-fifths in value of those creditors who, in claiming against the estates of the said bankrupts as partners foresaid, have valued and deducted their claims against the company. (Signed) JAMES GOURLAY, *Trustee*."

Thereafter, the Sheriff-Substitute "discharges the bankrupt of all debts and obligation contracted by him, or for which he was liable, either as a partner of Crabb and Brown, manufacturers in Glasgow, or as an individual, at the date of the sequestration; and allows an act and warrant to go out and be extracted—all in terms of the Act 2 and 3 Vict., cap. 41."

None of the other creditors, who formed a large majority of the whole, concurred in the application at the instance of the bankrupt for a discharge. Against the interlocutor of the Sheriff an appeal was presented by Addison and Sons, who are company creditors. The case being now called.—

P. Fraser, for the respondent, (Crabb), objected to the title of the appellants to oppose his discharge, in so far as it was a discharge of him as an individual. They had lodged no claim against him as an individual, nor made any claim on his individual estate, and therefore claiming merely against the company, they had no interest, and no title to oppose the discharge of him in his individual capacity, which was all that was sought.

THE LORD PRESIDENT. The question is as to title to object to this application for discharge. It is conceded that in regard to part at least of the application, so far as it applies for discharge of the bankrupt as a partner of a company, there is here title to oppose, and therefore, upon the whole, I think the party ought to be heard.

The rest of the Court concurred, and the objection was repelled.

Monro, for the appellants, now objected to the discharge, that the bankrupt had not obtained the statutory number of concurring creditors, and that an unfair device had been attempted.

LORD IVORY. It is not without importance, that in the list of creditors which is laid before us, not only these five individuals who are said to be the only creditors properly entitled to vote on the individual estate, but a number of other creditors, including the appellants, have all received a dividend; and now, having exhausted the company estate, and the individual estate, seeing now there is nothing else to do but to grant a discharge, these five come forward and say, we shall enter into a plan for giving the bankrupt his discharge without the general concurrence of the creditors. That is a thing unprecedented in the annals of the Court. They are altogether in error. The trustee has not followed out the statute by distinctly reporting as to the creditors concurring and those not concurring. The Sheriff has not noticed the

Mar. 2. 1853. irregularity of the trustee, and therefore I think the best way is to sweep away the whole proceedings.

Addison and Sons v. Crabb. The rest of the Court concurred.

The COURT therefore "sustain the appeal, recal the interlocutors appealed from; refuse the discharge *in hoc statu*, and decern."

Adam Paterson, W.S., Appellant's Agent.

John Walls, S.S.C., Respondents' Agent.

(J. S. M.)

No. 140.

PETITION, W. S. STIRLING CRAWFURD.

Disentail—Affidavit—Omission of Debt—Supplementary Affidavit.—In the proceedings for disentail, a debt constituted a reserved real burden, in which the petitioner is the creditor:—*Held* to be a debt which must be set forth in the affidavit under the statute; and where omitted, and the Lord Ordinary has made the usual remit, the defect may be cured by a supplementary affidavit.

1st Division. This case was reported verbally by Lord Curriehill. His Lordship stated that this was an application for disentail, and that everything appeared to be right in the procedure except the affidavit, which was liable to the following objection:—The petitioner had purchased and entailed some lands, which now formed a portion of the entailed estate. The price of this was paid partly by money, which he was bound to invest under the fetters of the entail, and partly by money belonging to the petitioner himself; and the latter portion of the price had been constituted a real burden over the property so purchased, in favour of the petitioner himself, his heirs and assignees, with interest from and after the first term after his death. Mention of this debt was omitted in the affidavit; but the petitioner pleaded, that the statute did not contemplate his setting forth debts in which he himself was the creditor, and farther, that in this case the debt would, immediately on his death, be extinguished *confusione*, and that, therefore, it was unnecessary to mention it. His Lordship's difficulty was, in the first place, that the debt is a standing subsisting debt on the estate; and, in the second place, that the creditor is the petitioner himself, and his heirs and assignees, and that the section of the Act of Parliament requiring all the debts affecting the entail to be mentioned, renders it difficult to dispense with mention of it in the affidavit.

Dundas. There is no person who can be prejudiced here, and therefore the omission of the debt in the affidavit ought not to affect the validity of the affidavit. *Gordon*, 28th Nov. 1851.

The LORD PRESIDENT. The question is, what the Act of Parliament requires. Now, it requires an affidavit of the debts, and this party has made an affidavit of these, but it is said that it does not contain all these debts. There was of course no intention to make this omission:—(1.) Is this such a debt as ought to have been mentioned in the affidavit? and (2.) If so, can the omission be cured at this stage? In regard to the first of these questions, the statute makes no exception. It is comprehensive in its expression. There can be no doubt that this is a debt affecting the estate. But this is a clause affecting the creditors; and therefore the question arises, is this in such a position as brings it within the true intendment of the clause? I think it would be hazardous to go into an inquiry as to what parties are entitled to notice.

The safe course is to have all the debts mentioned, and then the Court will judge whether intimation should be made. But to allow the party to determine for himself whether the debts are to be set forth or not, would introduce looseness in the procedure, and therefore I am disposed to hold that this is a debt which ought to have been mentioned. But then we come to the second point, supposing the party discovers that there is an additional debt, and after the usual remit by the Lord Ordinary, he wishes still to enter that debt in his affidavit, or to make a supplementary affidavit, is there anything in the statute which prevents his doing so? I think that it would be wrong just now to hold that the matter cannot proceed at all. I would rather allow the party to make a supplementary affidavit in the matter.

LORD FULLERTON. I am quite satisfied it compromises no principle.

LORDS CUNINGHAME and IVORY concurred.

The COURT therefore allowed the petitioner to make a supplementary affidavit.

Dundas and Wilson, W.S., Petitioner's Agents.

(J. S. M.)

SEYMER v. SPOTTISWOODE.

No. 141.

Augmentation of Stipend—Obligation of Relief—Transmission.—An obligation to relieve from augmentation of stipend does not run with the lands, but requires some direct express transmission of the right to the party founding upon it; and, therefore, a title completed by resignation of the lands, teinds, &c., though it transmits the feudal subjects resigned, does not carry the clause of relief, which still lies in *hereditate* of the party executing the procuratory of resignation.

This was a process of locality of the stipend of the parish of Legerwood, which now came before the Court on the question whether John Spottiswoode of Spottiswoode, one of the heritors of the parish, was entitled to relief from augmentation of stipend as against Henry Ker Seymer of Morristoun, also an heritor of the parish. The progress of titles transmitting to Spottiswoode the right of relief now claimed by him was as follows:—

By disposition, dated 8th January and February 1726, Andrew Ker, younger of Morristoun, patron and titular of the teinds of the parish of Legerwood, and heritable proprietor of lands therein specified, thereby disposed and conveyed in favour of Alexander Hay, advocate, the lands of Dodds and others, in principal, together with the tithes, both great and small, parsonage and vicarage of the said lands and others, and also certain other lands and teinds in special and real warrandice and security of the said principal lands, and which disposition contains a clause of warrandice in the following terms:—“And which lands and others, principal and warrandice, before disposed, with the tithes and pertinents thereof, we, &c., bind and oblige us and our foresaids to warrant, acquit, and defend, to be good, valid, and sufficient, free, safe, and sure to the said Mr Alexander Hay, and his foresaids, from all . . . tacks, inhibitions, interdictions, apprysings, adjudications, reductions, improbations, ministers' stipends, schoolmasters' fees and augmentations thereof, tithe duties, and annuys of tithes, and generally from all other perills dangers, &c., whatsoever, excepting from the above warrandice, a tack of the said lands of Dodds and others, . . . as also, excepting therefrom the sum of eighteen pounds, Scots money, as the vicarage tithes of the saids lands,

Mar. 2. 1853. payable yearly to the minister of Legertwood." Alexander Hay having been infert on this disposition resigned the lands, teinds, and others, under reservation of his own liferent, in favour of Thomas Hay, advocate, his eldest lawful son, who completed his title thereto by a Crown charter of resignation, of date 12th February 1833, and infertment thereon. By this charter, the disposition, with the instrument of sasine following thereon, is confirmed in the whole heads, articles, tenor, and contents thereof, in the same manner as if the disposition had been word for word inserted therein. By disposition dated 7th March 1746, Thomas Hay disposed to and in favour of Alexander Hay, his eldest lawful son, and the heirs male of his body, *inter alia*, the lands and warrandice lands contained in the disposition of 1726. And the disposition contains an assignation of writs in the following terms:—"And, further, I hereby assign, transfer, and dispone to, and in favours of the said Alexander Hay and the heirs male of his body, which failing, to my other heirs in manner afore-mentioned, the hail writtes, evidents, rights, titles, and securities, old and new, of and concerning the said lands, barony, and others, made, granted, or conceived in favours of me or my authors, with the several charters, apprisings, adjudications, dispositions, and conveyances thereof, and the procuratories of resignation, precepts of sasine, and hail other clauses therein contained." On 16th November 1786, Alexander Hay, the second, executed a disposition, proceeding upon a minute of sale, in favour of John Spottiswoode, younger of Spottiswoode, his heirs and assignees whomsoever, heritably and irredeemably, of, *inter alia*, the said "lands of Dodds, with the mill, mill lands, multures, sucken and sequels of the same, with houses, biggings, parts, pendicles, and pertinents thereof, lying within the parish of Legertwood, and shire of Berwick, as then possessed by Andrew Shiell, together with the teinds, as well great as small, parsonage and vicarage of the lands and others above-mentioned," together with all right, title, and interest, either of property or possession, whether petitory or possessory, which he, his authors, or predecessors had, or anyways might have claim, or pretend, to the said lands, mill, teinds, and others, or to any part or portion thereof, or pertinents of the same. This disposition also contains an assignation to writs and evidents in the following terms:—"And further, I hereby assign, transfer, and dispone to and in favour of the said John Spottiswoode, younger, and his foresaids, the hail writts, titles, rights, and securities of the lands above disposed, old and new, made, granted, and conceived, or which may be interpreted to be conceived in favours of me, my predecessors, or authors, of or concerning the lands, mill, mill lands, multures and sucken, teinds, and others above disposed, or any part or portion thereof, or pertinents of the same, and particularly and without prejudice of the generality foresaid," *inter alia*, the disposition foresaid of, *inter alia*, the lands of Dodds, with the mill, mill lands, multures, sucken, and sequels thereof, granted by the said Thomas Hay to the said Alexander Hay, his eldest son, dated the 11th day of March 1746, and recorded in the Books of Council and Session the 13th February 1755, "with the whole clauses, tenor, and contents of the said writts and evidents, generally and particularly before assigned, in so far as concerns the lands, mill, mill lands, multures, sucken and sequels, teinds, and others before disposed, with all action and execution competent to follow thereupon." The disposition also contains an

obligation by Mr Spottiswoode's predecessor to free and relieve the disponent of all public and parochial burdens that should become due and payable for all years and terms in time coming, from and after his entry to the said lands. Along with the disposition, there was delivered up by Alexander Hay, the disponent, to Spottiswoode, an inventory of writs of the lands so disposed, and others, signed by John Spottiswoode and Hay, as relative to the minute of sale. John Spottiswoode, now of Spottiswoode, completed his titles to the lands of Dodds and others, by general service to his father, the last mentioned John Spottiswoode, and Crown charter, proceeding on the procuratory contained in the foresaid disposition of 16th November 1786, and by infeftment following thereon. In these circumstances he pleaded, that the clause of warrandice formed a valid obligation against the party bound therein. On the other hand Mr Seymer pleaded, that the obligation had not been duly transmitted to Mr Spottiswoode, and that he had therefore neither title nor right to insist therein.

The Lord Ordinary (Robertson), pronounced an interlocutor containing special findings with regard to the progress of the titles, and, *inter alia*, finding that by the "propulsion of the succession in favour of Thomas Hay, the eldest son of the said Alexander Hay, he became fully vested in every right competent to his father under the foresaid disposition by the said Andrew Kerr, and, in particular, in the clause of warrandice and obligation to relieve from stipend or teind duty beyond the amount of the vicarage of L.18 Scots; and that on the death of the said Alexander Hay, no general service was required on the part of the said Thomas Hay, to take up the foresaid clause of warrandice and obligation of relief; . . . That the said John Spottiswoode, now of Spottiswoode, is fully vested in all right to the said lands of Dodds, and teinds thereof, and to the clause of warrandice and obligation of relief from augmentation, contained in the foresaid first mentioned disposition of 8th January and 23d February 1726, granted by the said Andrew Ker: Therefore, repels the pleas of the respondent, and finds the said John Spottiswoode, now of Spottiswoode, entitled to relief accordingly, and appoints the case to be enrolled, in order that the extent to which relief can be given in this locality may be ascertained: Finds the said John Spottiswoode entitled to the expenses incurred on this head, and remits the account thereof, when lodged, to the auditor to tax and report."

In the note appended to his interlocutor, his Lordship stated, that, 1. After the decision in the case of the *Duke of Roxburgh v. Marquis of Lothian*, 28d January 1838, Shaw, 16, p. 341, the Lord Ordinary considers there can be no doubt as to sustaining the competency of giving relief on a personal obligation against future augmentations to a certain extent, and in adjusting a new locality. 2. Neither can it be contended that the negative prescription runs generally against the obligation from its date, else this would defeat its object entirely, but only from the date of each augmentation and locality made without challenge against the right of relief, *Lennox v. Hamilton*, 14th July 1848, Dunlop, 5, p. 1357. 3. Nor if the obligation be one granted by the proprietor of the lands from whom the title of the party flows to his representative, can there be any question that such party is liable in the relief, and in this case on the construction of the import of the obligation, no question was raised.

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Indeed, 4. The main strength of Mr Seymer's plea was rested on the ground that the obligation of relief was one merely personal, and did not attach to the lands, nor was conveyed along with these lands, and the judgment in the House of Lords in the cases of *Maitland v. Horn*, 21st February 1842, Bell's Appeal Cases, vol. 1, p. 1, and *Sinclair v. the Marquis of Breadalbane*, 14th August 1846, Scottish Jurist, vol. 18, p. 626, were strongly founded on. In the former case, the true nature of an obligation of relief from augmentation is shown to be not a warrandice which necessarily runs with the lands, but "a contract," as Lord Cottenham expresses it, "perfectly collateral to the subject matter of the sale." Certainly there is no decision that a separate title requires to be made up to the obligation under the contract, or that it is not capable of assignation. The proper mode of conveying a personal obligation of warrandice, (which to that effect is a correct enough description of the obligation of relief,) is by an assignation to the writs and evidents. Stair, b. 2, t. 3, s. 46. Mr Spottiswoode, in the present case, has obtained an assignation to the writs and evidents, and whether the obligation is to be termed personal warrandice or separate contract, he has obtained assignation to that contract, and actual delivery of the instrument by which Andrew Ker became bound to relieve Hay and his successors in the lands of Dodds from future augmentations. This may not be an obligation which necessarily runs with the lands, but it is one in favour of the owner of the lands, and available to him only. It is far from being necessarily separated from the right to the lands and teinds. It is capable of being assigned. Assignation to the writs and evidents is surely a competent mode of assigning it, and this having been done, Mr Spottiswoode is in the right of Hay.

But it was contended that the obligation in favour of the original Alexander Hay never was conveyed by him to his son, and that it still remained in his *hereditas jacens*, being a right which did not go to executors, but capable of being taken up by a general service. It is true that Thomas Hay resigned upon a procuratory granted by his father, who propelled the succession. But the charter of resignation which followed upon that procuratory contained an express confirmation of the disposition by Andrew Ker, and infestment following on it. The son, therefore, stood in the full right of the father, as to the disposition and everything contained in it. He required no general service to take it up after his father's death. From him it was regularly transmitted downwards till it came into the person of Mr Spottiswoode, and thus there here exists the very thing which was wanting in the cases of *Maitland v. Horne*, and *Sinclair v. Breadalbane*. See further on this head also the case of *Lennox v. Hamilton*, 14th July 1843, Dunlop, 5, 1357.

Against this interlocutor, Seymer reclaimed.

After argument:—

The LORD PRESIDENT. In the view which I take of the judgment of the House of Lords in the case of *Sinclair v. Breadalbane*, I confess the law applicable to the point on which I think the case turns, appears to be in an unsatisfactory state as to its certainty. The important point here was this, that while an obligation of this sort was held to be a sort of personal obligation, it was laid down that the right did not run with the lands; but it was also laid

down that it was not a right which belonged to the executor. If so, what I wish to hear more argument on, is, how is this right transmitted? Does it require service or not? I am not aware of any case in which the heir made up a separate title to that clause. I should like more argument on this point. If it is to be held a right which passes without service, many of the dangers apprehended from the judgment of the House of Lords would be removed.

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The rest of the COURT concurred.

The *Solicitor-General*, for the reclaimer. The decisions of the House of Lords in *Horne* and *Sinclair*, establish that such an obligation must be transmitted in some way separate from the lands. This obligation having reference to land I take to be heritable, although it is immaterial whether it be heritable or moveable. The general rule is, that heritable subjects require service unless where specially exempted; 3 Stair, 5, 4, and 6; 3 Erskine, 8, 77 and 78; Bell's Prin., § 1854. The original object of service was the transmission of strictly feudal estates; but, by degrees, the use of it was extended to other heritable subjects, particularly bonds and obligations, 2 Ersk. 2, 12; 3 Ersk. 8, 73; *Veitch v. Young*, 25th May 1808, M. App., Service and Conf., No. 4., p. Lord President. The right here in question does not come within any of the exemptions. It is analogous to a bond; there is a debtor and creditor concerned in it. It is not part of the feudal estate: and not being specially exempted, it requires service. In the transmission of this right, therefore, Hay, the son, is merely a disponent; while the transmission to Spottiswoode merely conveyed writs and evidents generally, and was not sufficient to convey this obligation.

Baillie, contra. A clause of this nature has always been treated as substantially a clause of warrandice; *Cunningham v. Cuthbertson*; Shaw's Teind Reports, p. 175, 27th January 1829. This is a right which relates to an heritable subject, viz., teinds, and there can be no doubt that it was intended to pass with the teinds in favour of the party to whom the teinds were granted, and to that person's heirs and assignees, for it could be of no use or avail to any one else. *Carmichael v. Anstruther*, 22d May 1821. Then how is this right to pass? It is said that the obligation still remained in Alexander Hay the first. But the right which he had once held was one which went with the teinds; there was, therefore, no right in him which could be taken up by general service: and, therefore, unless it was directly granted to Thomas, the case comes to this, that the right falls altogether. But the assignation to Thomas was sufficient to carry the right; 2 Ross's Lectures, 290. The conveyance to him in his character of heir was equivalent to service; and, after that, he could not have taken out service, simply because he already held the whole rights which had been in his father, and there remained nothing to serve to. The general rule stated by the authorities is, that a right having a tract of future time is taken up without service; 2 Ersk. 2, 6; Bell's Prin., *ut supra*; *Carmichael v. Anstruther*, *ut supra*; and the reason is, that such a right cannot transmit to the executor, and therefore must go to the heir. The heritable character of the right in question arises solely from its having a tract of future time. General service was not recognised in our older law as a mode of passing a right. The custom of law has established that certain rights pass without service, and, if so, the question is decisive, whether a general service was ever obtained on

Mar. 2. 1853. passing a right such as this. It may not run with the lands: but it was transmitted in the way proper to such rights without service. Again, there is here a sufficient transmission from Thomas to Alexander, Ersk. 2, 3, 46, and, if so, there can be no question but that the transmission from Alexander to Spottiswoode is sufficient also.

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The COURT made avizandum with the cause, which was again called to-day to be advised.

The LORD PRESIDENT. The view I take of this case rests on a very short and narrow ground. The property formerly belonged to a family of the name of Ker. In 1726 Andrew Ker disposed the lands, teinds, and others to Alexander Hay, with a clause of warrandice "from all and sundry wards, reliefs, &c., minister's stipend, schoolmaster's fees, and augmentations thereof, and generally from all other perils, burdens, evictions, and inconveniences whatsoever." That sort of clause plainly contains an obligation to free and relieve the disponee from augmentations of minister's stipend, and it treats that matter as a matter of warrandice; whether rightly or wrongly is another question. But it does treat it as a matter of warrandice, and there is an express exception of a "tack to Margaret Bell, and of the stipend at that time payable to the minister of Legerwood, which exceptions shall no ways import or imply any contravention of the clause of warrandice before written." The stipend to the minister was therefore treated as a matter falling within the clause of warrandice, and I believe it was so treated in accordance with the view then taken by all conveyancers as to the nature of such an obligation, so expressed. The clause deals with augmentations of stipends, on the same footing with the other matters there mentioned, such as tacks, wadsets, &c.

Then in 1733 Alexander Hay, who had so acquired the lands from Ker, executed a procuratory of resignation, whereby, under reservation of his own life-rent, he resigned the lands, teinds, and others, in favour of his eldest son Thomas Hay, who completed his title by crown charter of resignation. That, I understand, was all the title he made up.

Then in 1744 Thomas Hay conveyed the lands and teinds to his eldest son Alexander Hay, the second of that name, and in that conveyance there is a clause of assignation of "the haill writtes, evidents, rights, titles, and securities, old and new, of and concerning the said lands, barony, and others, made, granted, or conceived in favours of me or my authors, with the several charters, apprisings, adjudications, dispositions, and conveyances thereof, and the procuratories of resignation, precepts of sasine, and haill other clauses therein contained." That I hold to be a conveyance of the disposition of 1726, and the whole clauses therein contained. A question is raised, whether in the state of Thomas Hay's title at that time, this could mean any thing more than a disposition of the lands and teinds, with the clauses to which Thomas Hay then had right. If Thomas Hay's title had been completed in another form, the case presented to us would have been different.

In 1786 Alexander Hay sold the lands to John Spottiswoode the elder, and in reference to that sale we have a minute of sale and disposition, and relative inventory of writs. This disposition contained an assignation to the haill writs and titles, "with the whole clauses, tenor, and contents of the said writs and evidents, generally and particularly before as-

signed, in so far as concerns the lands, mill, mill lands, multures, sucken and Mar. 2. 1853.
 sequels, teinds, and others before disposed, with all action and execution com-
 petent to follow thereupon." There was also delivered up with it an inventory ^{Seymer v.}
 of titles, in which is recited specially the disposition of 1726, which contained ^{Spottiswoode.}
 the original obligation of relief by Ker. John Spottiswoode the second, com-
 pleted a title by general service as heir of his father.

A question now arises in the process of locality of Legerwood, as to the claim of Mr Spottiswoode, the present holder of the lands, to relief from augmentations of stipend under the original disposition by Andrew Ker to Alexander Hay. In the course of the discussion a preliminary question was raised, whether this was a competent form in which to try the matter at issue. But the parties did not press that point; they hardly brought before us materials on which to decide it if seriously insisted in, and accordingly I have not given my mind to the consideration of it. We come, therefore, to the question itself, whether Mr Spottiswoode is in a condition to enforce this claim of relief? The obligation of relief, I think it is scarcely disputed, rests upon Mr Ker Seymer as the representative of Andrew Ker, the original disponent, and if the lands and teinds had passed from the first Alexander Hay, the disponent, to his direct descendants, by general service, the whole writs being taken up by that service, I do not understand that there is any dispute, at least I see no good reason for doubt as to the right which in that case would have vested in the last Alexander Hay and his disponent, Mr Spottiswoode, to enforce the obligation. If there had been no difficulty as to the right of Thomas Hay to transmit the right of relief to his son, I should have had less difficulty than I have; because, even taking into view the case of *Sinclair v. Breadalbane*, in the House of Lords, I would have had great difficulty in coming to the conclusion that there was not an assignation to this right. For even though I were to consider the judgment of the House of Lords, as fixing that a right of relief from augmentations was a mere personal right, and did not run with the lands, but must be taken up on a separate title, there is no incompatibility in holding that both rights or titles might be contained in one deed, and that where there has been no break in the link, an assignation to that deed with all its clauses must include a conveyance of the clause of relief from augmentations of stipend, as well as the other clauses. It is an obligation which no one can enforce but the party in right of the lands and teinds; it is an obligation for his benefit; and when there is an unquestionable assignation to the deed which contains that clause, "with all its clauses," I do not see on what principle we could exclude that clause from the operation of the assignation. Unless there be some reading of the judgment of the House of Lords different from mine, I do not see how that result could follow. But the difficulty I have in this case is, to find, consistently with the judgment of the House of Lords, that this right ever came to be vested in Thomas Hay. The right was in Alexander Hay the first, and though Thomas Hay was his eldest son, his title rests entirely on the resignation which, in the view taken by the House of Lords, as I read the judgments in the cases of *Horne v. Breadalbane* and *Sinclair v. Breadalbane*, could not transmit this right. The right, according to these judgments, does not run with the lands or feudal subjects necessarily, but requires a conveyance.

Mar. 2. 1853. But this mode of making up the title by resignation, though it transmits or transfers the feudal subjects resigned, does not carry the clause of relief. It
 Seymer v. does not deal with it at all. This breach in the link puts the case very much
 Spottiswoode. in the same position as the defective link in the title of Alexander Sinclair in the case of *Sinclair v. Breadalbane*. I cannot read the judgment of the House of Lords in the case of *Horne v. Breadalbane* otherwise than was done by Lord Moncreiff and Lord Wood in the subsequent case of *Sinclair*; and if it was well read by them, I think the claim of Spottiswoode is defective, by reason of the breach of that link. Lord Moncreiff and Lord Wood held, that the judgment of the House of Lords proceeded on the principle that this sort of obligation is not of the nature of warrandice; that warrandice relates to the lands and teinds themselves, and protects against eviction; but that an augmentation of stipend was a thing which followed the right to the teinds in the natural course of law; that it was a natural quality of the right, and therefore was not eviction, and so not within the clause of warrandice. It is not for me now to consider whether that is a right reading of the clause of warrandice in reference to augmentations of stipend. It appears to me to imply, that in this country we have all along been in a common error on that point; that when our conveyancers formed our conveyancing language, they formed it badly, and attached to the words they were using a meaning which they ought not to have attached to them, and gave to them in practice an effect which they ought not to have given to them. Still we were corrected. We are, however, under this further disadvantage, that we have not been instructed how such a title is to be made up, or what is the proper mode of dealing with this species of right. The obligation rests on the representatives of the original disponent. The right to enforce that obligation belongs to nobody but the possessor of the lands and teinds; it cannot be given to a third party; no third party can use it. That is the position in which we are placed. I agree with Lord Moncreiff, that whatever may be our own views, we must give effect to that judgment of the House of Lords, and carry it out whatever may be its legal consequences, although such consequences may not have been foreseen, till we are corrected elsewhere, and are told, that we have misunderstood the judgment, and are pushing it too far. I may be misreading the judgment, and I should not be sorry to be corrected, but I read it as Lord Wood and Lord Moncreiff read it in that case of *Sinclair*. The Judges of the Second Division, with the exception of Lord Moncreiff, took a different view from Lord Wood—the Lord Ordinary. They held that the case of *Horne v. Breadalbane* had no application, and that Lord Wood was pushing the judgment in that case too far beyond its proper meaning. But in the House of Lords, the judgment of the Second Division was altered. Lord Campbell rested his opinion on two grounds. 1st, On the shape of the action. He thought the summons was not libelled so as to meet the case; but he did not decide on that ground only. He took up the other part of the case, and dealt with the view expressed by Lord Wood of the judgment in the previous case of *Horne*, and he stated that he entirely agreed with Lord Wood. That was not only a reiteration of the judgment in *Horne v. Breadalbane*, but it was extending that judgment, and applying it to the circumstances of the case of *Sinclair*. Therefore, unless I misunderstand that decision, I do not see my

way to any other result, than that which was arrived at there; that this obligation of relief was not proper warrandice; that it was not properly transmitted to Mr Spottiswoode; in fact, that it was not properly in the party who conveyed it to Mr Spottiswoode. It is in the want of a conveyance to Thomas Hay that the hiatus occurred. It appears to me, that these two decisions of the House of Lords establish that there must be some direct express transmission of the right to the party who founds upon it. Lord Moncreiff says, that it may be transmitted by service or by assignation. Whether Mr Spottiswoode can yet complete his right by getting the heir of Mr Hay to take it up, I do not know. It would appear to us rather a singular and bare thing to be the sole subject of a service. As the title stands, I do not see that it is any better position than the title by precept of *clare constat* made up by Alexander Sinclair in the case to which I have referred.

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LORD FULLERTON. The judgments pronounced by the House of Lords in the cases of *Maitland v. Horne*, 21st February 1842; and *Sinclair v. the Marquis of Breadalbane*, 14th August 1846; reduce within very narrow limits, indeed, the only point into which it is competent for us at present to enquire. Those decisions determined, beyond the reach of all challenge, that an obligation for relief against augmentations of stipend, though it had been described even in judicial parlance, and dealt with as a species of warrandice, did truly differ from that kind of obligation in one most essential and distinctive element, which materially affected its mode of transmission. A proper obligation of warrandice being truly an obligation to supply any defect in the conveyance of the lands, is, to that extent, a *surrogatum* for the lands themselves, and may therefore upon strict legal principle, be held to pass by the titles by which the lands themselves are conveyed: But, however convenient it might have been in practice to assimilate to warrandice, in the proper sense of the term, an obligation for relief from augmentations of stipend, it would be difficult I think, to deny the legal accuracy of the distinction taken by Lord Cottenham in the case of *Maitland v. Horne*; according to which the latter is a mere personal contract, "that in a particular event happening to diminish the value of the property sold, the vender shall come in and indemnify the purchaser against the diminution of income sustained by the exercise of that legitimate authority by which part of the income arising from the teinds may be applied to the support of the minister. That such a contract may be the subject of assignation, and may be passed from one hand to another, is not now in dispute." And the question is put by his Lordship "if it requires a particular assignation—what evidence have we of any such assignation?" That is the only question which can possibly arise now, and it was with a view to it, that we ordered the additional argument. And I must say that after hearing that argument, it does not appear to me that the pursuer has made out his case. It may be true, as stated by the Lord Ordinary, that the House of Lords did not hold "that a party, shewing that he was in possession of the right under the contract, required to shew this by any titles separate from those by which he acquired and held the lands, if these titles also imported an assignation in his favour of the right of relief." But they clearly did hold that to support the possession of the right under the contract, a conveyance or transmission of the contract of and in addition to the ordinary import of

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the titles to the lands was indispensable. And when the Lord Ordinary then proceeds in his note to state that "the proper mode of conveying a personal obligation of warrandice (*which to that effect is a correct enough description of the obligation of relief,*) is by an assignation to the writs and evidents," he seems to me to fall into that very error from which the pursuer's counsel have found it impossible to keep free, namely, that of confounding an obligation of warrandice with a personal obligation for a relief of stipend—so far from that being a correct enough description of the obligation of relief, it is a description which the previous judgment of the House of Lords had determined to be completely erroneous. The pursuer then can take nothing by the supposed competency of conveying an obligation of warrandice. And it would be necessary for him to shew that an assignation to writs and evidents is a good conveyance of a personal obligation which is not an obligation of warrandice at all, but a mere personal obligation of an essentially different kind: But it is perhaps unnecessary to go into this, because in truth there is no unbroken transmission even of writs and evidents capable of supporting the pursuer's case. It may be true that Mr Spottiswoode had in his titles an assignation of that kind, but Mr Spottiswoode's ancestor was the acquirer from the Hays, and it is necessary to inquire whether this personal obligation of relief was ever so vested in the author of the Spottiswoodes as to validate the effect of an assignation of writs and evidents, even on the supposition—which to say the least, is very questionable—that that was the proper form of transmitting such an obligation. The clause of relief or warrandice, as it is termed, was contained in the conveyance of the tithes and pertinents from the Kers of Morristoun to Alexander Hay. Alexander Hay resigned the lands, teinds, and others, under reservation of his own liferent, in favour of Thomas Hay his eldest son, who completed his title by a Crown charter of resignation, and much importance is attached by the pursuer to the circumstance, that the said disposition is confirmed in the whole heads, articles, tenor, and contents thereof. Now this seems a perfectly good confirmation of all the rights capable of flowing from the Crown on the execution of an instrument of resignation; and of all rights which are legal accessories of such resignation; but in regard to a purely personal obligation of relief flowing from the Morristouns, the titulars of the teinds, which is no accessory to the feudal title, and which, to use the expression of the House of Lords; does not run with the land, and which no confirmation from the Crown, nor any rejection of that conformation, could make either better or worse, it would seem to me that the charter of resignation, which, it will be observed, is the only title flowing from Alexander Hay to Thomas Hay his eldest son, *quoad* the personal obligation, is no better than a piece of waste paper, and therefore, when Thomas Hay came to dispose in favour of his eldest son, Alexander Hay the second, the lands and teinds, including an assignation of the writs and evidents, he did, in so far as regards the personal obligation by the Morristouns, attempt to convey that which had never been carried to him, but which remained *in hereditate* of Alexander Hay the first, to whom the obligation had been originally given. What may be the correct form of making up a title to such a personal obligation, it may be a matter of some difficulty to say, but most unquestionably there is here a blank in the transmission of the personal obligation, which as yet there has

been no attempt to supply—whether the conveyance of writs and evidents successively granted to the Spottiswoodes is the proper form for such a transmission, I am not quite prepared to say; it is a perfectly good transmission of all the rights which it is said run with the lands. But a personal obligation of relief is something essentially different, and unless on the supposition of its pertaining to the nature of a clause of warrandice, which we are not entitled to assume, the mode of making up titles to such an obligation must depend on its own legal character. That legal character is one of a very peculiar kind; it is in one sense a personal obligation, but a personal obligation having *tractum temporis*, and limited to a particular succession of creditors, viz., those who are in the right of the teinds, and may therefore be called upon to perform that obligation to pay augmentations of stipend, while the debtor in the obligation of relief has bound himself to relieve them. I see no objection to an obligation of this kind, peculiar as it is, being carried by express assignation, and that was the expressed opinion of Lord Cottenham in the case of *Maitland v. Horne*. I may also add, that I see no entrinsic objection to such a personal obligation, partaking, as it does, of many elements of a real character, being taken up by service, which the counsel for the defender maintained to be the proper form. But here we have neither the one nor the other, and I am compelled to come to the same conclusion as that arrived at by the House of Lords in the cases alluded to, that good as the obligation was in itself, there is a manifest blank in the evidence of its transmission to the pursuer.

LORD CUNINGHAME. Upon giving all the attention in my power to the argument of the reclainer, and having fully in view the doctrine of the House of Lords in the cases of *Lord Breadalbane's Trustees v. Horne and v. Sinclair*, I am unable to differ from the Lord Ordinary, as I feel that an opposite decision than that now pronounced by the Lords, would lead to a subversion and uncertainty in many progresses of feudal titles in Scotland, hitherto deemed secure and unchallengeable. It does not seem to be disputed, that if the respondent, Mr Spottiswoode, has right to found on the warrandice of the pursuer's predecessor to any effect, it may be tried in this process of locality, as the reclainer, Mr Ker Seymer, is said to be not only titular of the teinds, but seems still to hold valuable properties in the parish; and the practice, both before and after the case of the *Marquis of Lothian*, noticed in the outset of the Lord Ordinary's note, has very frequently gone to have such questions of relief discussed and decided in processes of locality. This leads at once to the merits of the question between the parties before us, which depend on a short chain of titles of simple and easy deduction.

His Lordship, after referring specially to the progress of the titles in the case, then proceeded:—

Thus standing the case, I have searched in vain for a single example in the whole course of Scotch conveyancing, where a purchaser was not entitled to found on any obligations or provisions necessary for the protection or perfecting the title of lands and teinds sold and given over in possession to a purchaser, as before detailed. Where is the doubt of these titles being sufficient to operate a purchaser's relief in case of the eviction of any of the lands or teinds bought? It was argued that Alexander Hay jun., in 1786, had

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 Seymer v. ponee and grantee of the warrandice from the ancestor of the reclaimer. But
 Spottiswoode. Alexander Hay jun., in 1786, was, on the face of the whole titles, the *ap-
 parent heir* of his grandfather, as well as the heir of law, on titles delivered up
 to the purchaser and *entered in the Inventory produced*. If the case depend
 on apparency alone, it cannot surely be laid down that an apparent heir for a
 full price paid, as is Spottiswoode's case, has not a valid title to assign a
 collateral right? The Act 1693 manifestly obviated any objection of that
 sort.

We have been referred, however, to the case of *Horne v. Sinclair* in the
 House of Lords as decisively ruling the present question. I have repeatedly
 considered these cases, but think they are essentially different from that now
 under consideration. The present case when examined, seems to me to pos-
 sess the requisites which were desiderated for the pursuers in the cases of
Horne v. Sinclair, but held to be wanting in both. In *Horne's* case (I.
 Bell's Reports, p. 1,) Lord Chancellor (Cottenham) laid it down that such
 an obligation of warrandice as that given by Andrew Ker to Alexander Hay
 in 1726, might be assigned; but his Lordship questioned the sufficiency of a
general assignation of writs, without a *special* assignation to entitle a pur-
 chaser or third party to proceed against the original granter. In *Horne's*
 case, there was nothing but a general assignation of writs, without any refer-
 ence in inventory or otherwise, to the particular deed by which the warrandice
 was granted or transmitted;—the Lord Chancellor rested his judgment in part,
 on the fact that the parties then before the Court, did neither represent the
 original granter or grantee of the obligation of relief. The present case is the
 very reverse of *Horne's* case on both these points.

In the later case of *Sinclair* again, in 1846, although the decision of this
 Court was also reversed, from a peculiar view which the Court of Appeal
 adopted, as to the form or explicitness of the record in the absence of writs,
 Lord Campbell appears to have taken an opportunity of correcting some essen-
 tial misconceptions which had prevailed as to the grounds of decision, both in
Horne's case and in *Sinclair's*. "I, by no means, said his Lordship, yield to the
 argument urged for the appellant at the bar, that the obligation sued on is a
 mere *personal* contract, which upon the death of James Sinclair, to whom it
 was given, went by confirmation to his executors. This might be so by the
 law of England, yet it seems quite clear that by the law of Scotland, such an
 obligation does not go to executors, although it may be so far collateral as not
 necessarily to pass with the lands or teinds to singular successors. It does
 not come within the definition of any Scotch law book of authority of things
 which go to executors; there never has been an instance of executors suing
 on such an obligation, and whatever difficulties have been stated to the mode
 of its transmission, I believe that no Scotch lawyer has ever supposed that it
 was part of the personal estate of the grantee. I beg leave likewise to men-
 tion that I am not influenced by the argument that the warrandice is not in-
 troduced at length into the charter of the Earl of Breadalbane; for I think
 that this charter contains words expressly and specifically referring to the
 warrandice in the contract, which may be considered as embodying it in the
 charter, according to the maxim, *verba relata in esse videntur*. I arrive at the

conclusion that the defender ought to be assolizied, *from the manner in which the pursuer has shaped his case in the summons*, and the manner in which he has supported it by proof;" Jurist, vol. 18, p. 628. Mar. 2. 1858.

That ground of decision requires to be very particularly kept in view, as it has been observed in argument in the present case, that Sinclair was admittedly the *apparent heir* of the disponent of the obligation of relief of Lord Breadalbane, and his title to disponent was thus maintained by some of the Judges as incontrovertible. Undoubtedly the case so stood; but the Court of Appeal did not, and could not, reject that plea, as Lord Campbell, in the words before quoted, declared that the record was so prepared as to *exclude them from considering the title*, or any of the other points on which the merits of Mr Sinclair's claim depended. The House of Lords, on that account, gave no judgment against Sinclair's title, if it had been properly urged.

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Now, is there any room for these objections against the respondent's claim here? It appears to me that they are manifestly precluded in the present question by the title and productions of the respondent. The detail in the respondent's condescendence from Arts. iii. to xi., specifies a series of titles connecting the respondent with the original obligation of warrandice or relief, to my mind satisfactory and irresistible. As I read the judgment of the learned Lords in the cases referred to, the reasoning on which it proceeded would have had no place, if writs such as those granted by the original seller in the present case, and the chain of titles from the first purchaser down to Mr Horne, had been assigned *per inventory* and had been exercised, or delivered up to, and *produced* by Mr Horne in the process. A seller may assign writs either by *specification* in the conveyance, or by reference to an *inventory* subscribed by the parties as relative thereto. In either way, the intention of parties is clear; and the assignation, especially when followed by *delivery* and *possession*, is unexceptionable.

Accordingly, it is impossible to see, what was the purpose or use of an assignation, and a delivery afterwards, of writs *per inventory*, except to enable the purchaser to operate his relief, just as the seller could have done before the sale, in case of eviction of lands by a prior title, or of the teinds by an *augmentation*. The obligation being personal as well as fortified by real warrandice, the first purchaser and his assignees were entitled either to sue the representatives of the seller, when solvent, in a petitory action; or had it been otherwise, they might also proceed on the title against the warrandice lands by adjudication; I am not aware on what ground the respondent could have been prevented from *constituting* his obligation, and *adjudging* the warrandice lands of Snook conveyed in security of the warrandice by the original disposition which his authors held; and on the comprehensive assignation which he held in different forms to all his author's rights.

Hitherto it has been held in our practice, that very extensive effect was due to general clauses of assignation of writs, for enabling purchasers and disponents to take up and act upon any writs of an inventory which are necessary for making up a title, and for protection of the estate and its pertinents as conveyed to them. For example, I might appeal to all lawyers and conveyancers of experience, that many thousand procuratories of resignation and precepts of *sasine*, have, from year to year, been taken up upon such clauses, in order to complete

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titles; and no one can foresee what would be the consequence to proprietors and their families, of unsettling that universally understood rule and usage in our system of titles. If the decisions in the cases of *Horne* and *Sinclair* are held to apply to such cases, the law must be so enforced at all hazards in similar cases, and the consequences cannot be foreseen. But surely the law laid down so recently in the Court of last resort for the first time, in the cases referred to, is not to be extended to other titles of a different description, where the writs assigned have been actually specified and *identified* by an *inventory subscribed by the sellers*, and *delivered* to purchasers. These are the grounds on which I am for adhering to the interlocutor.

LORD IVORY. I concur with your Lordship and Lord Fullerton. I have hardly a word to add. I feel myself tied down by the judgments of the House of Lords in the cases *Horne* and *Sinclair*, especially the last, and whatever violence they may do to our older practice, and how much soever they may appear to reflect on the accuracy and practice of Scotch conveyancers for centuries, and the law as countenanced by our institutional writers, I must take these judgments as affording the only correct exposition of the law in this matter. It is settled by these judgments, that an obligation such as this, to relieve from augmentations of stipend, is an obligation entirely distinct from a clause of proper warrandice. That is a clause protecting the integrity of the estate conveyed. But the obligation against augmentations of stipend is not a clause protecting the integrity of the estate at all, but collateral. It is an obligation by the disponent of the estate to relieve the present holder of the estate of its natural liability. Further, it is for ever settled by these decisions, that the obligation of relief is to be made the subject of a distinct and separate title; it does not run with the lands. This indeed I do not understand to be pleaded to us. The estate in the teind must be carried in the ordinary way. There must be a separate conveyance. Further, I hold it settled by these decisions, that this obligation of relief without its own peculiar mode of transmission, will not be carried either under the title by which the teinds are held, or by the mere fact of the party becoming proprietor of the estate. Taking these facts then into consideration as the radical grounds on which our decision must be rested, there is here a defect in the progress as regards the transmission of the obligation of relief. That objection to the title is not a question arising between the Hays and Spottiswoode, nor out of a transaction between them. It stands altogether apart from any deeds in 1786. It arises at an earlier period, in 1733, when the title to the lands and teinds was completed in the person of Thomas Hay, on resignation of his father. Now, his father was disponent under disposition from the Kers, and that disposition, while it conveyed the lands and teinds, also contained this separate obligation of relief. Therefore when Thomas Hay his son made up his title to the lands under the charter of resignation, that was a title which carried nothing but the feudal estate. It could carry nothing else. Therefore it is at this point of time that the separation is made between the estate and the obligation of relief, and the defect in the present title is, that from that time no step has been taken to resume this obligation of relief. It remained in *hereditate jacente* of Alexander Hay, and it does not appear that there was any other deed of succession by which it came into

the person of Thomas Hay. Then, if this defect is a blot in Thomas Hay's title, whatever title flowed from him must be subject to it also. He may have supposed that the whole combined subjects were vested in him, and he may have conveyed it to others in the belief that he was entitled so to convey. He may have made himself liable in warrandice to those to whom he sold, but as in a question between Spottiswoode, whatever may have been done by the Hays cannot in the least affect the right of the debtor in the obligation of relief to say there is no title in Spottiswoode's person. That seems the short summary of the law laid down by the House of Lords. If it had been held that service was not necessary, but that the right could be transmitted without it, or if the heir apparent by force of his mere apparency could take it up, that would have made a very clear case, for it would have relieved the question of the difficulty arising from the defect in the deed of 1733, and would have left it in a more favourable position for Spottiswoode, for it would have let in the effect of the assignation. But here again the judgment in *Sinclair* is exclusive of any such view, for, in that case, the party had made up his title by precept of *clare*; he was not merely in apparency, so that there was a much stronger piece of evidence in that case than anything we have here. The party might have maintained the argument that either his apparency or his character of heir was sufficient, but the House of Lords held that some form of title was necessary; that the admission of the superior in the precept of *clare* that the party held the character of heir—the recognition of that character without any reference to teinds, was not enough to transmit the obligation of relief, which being one not against the superior, but against the party granting it, was not transmissible through the superior at all. Now, what was done there equally occurs here. Here we have the title made up by resignation, and it must therefore be confined to what was in the superior to give. That leaves the obligation just where it stood between Hay and his disponent, an obligation which the superior could neither weaken nor strengthen. That being the case, this title made up by resignation is in the predicament of a title made up by precept of *clare*, and it is only different from the case of *Sinclair* in this, that there is no evidence that the party bears the character of heir. That just brings the case to where your Lordship put it, that unless a title can be made up connecting the party who now holds the property with Alexander Hay, there is a defect in the title which is fatal.

The Court therefore “sustain the first plea in law for Mr Seymer, alter the judgment of the Lord Ordinary, and recal the interlocutor reclaimed against accordingly, and remit to the Lord Ordinary to proceed in the locality; find expenses due to Mr Seymer in the discussion, &c.

James M'Allan, W.S., Agent for Mr H. K. Seymer.

W. H. and W. J. Sands, W.S., Agents for Mr Spottiswoode. (J. S. M.)

WREN v. TODD.

No. 142.

Multiplepinding—Competency—Judicial Factor—Exoneration.—Held, that a multiplepinding is an incompetent mode of exonerating a judicial factor, and *opinions* as to the competency of a multiplepinding raised in name of a judicial factor, and containing allegation of his neglect of duty.

1st Division.

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Wren v.
Todd.

The late James Carmichael, by trust-disposition and settlement, conveyed his whole estate to the now deceased Janet Black or Carmichael, his wife, in trust, so long as she remained his widow, whom failing, and in the events therein specified, to certain persons as trustees for the uses and purposes therein mentioned. Upon her husband's death, Mrs Carmichael entered upon the management of the estate. She afterwards married, and upon that event, she, in terms of her deceased husband's trust-deed, ceased to have any farther management of the estate. That accordingly devolved upon the trustees named in the trust-deed, all of whom accepted office. Of these trustees there is now no survivor. At their death, the trust-estate not being realized and distributed, a curator, and afterwards a judicial factor was appointed for the extrication of the trust affairs. Thereafter in 1848, George Todd, accountant, was appointed judicial factor on the estate. There was now raised a multiplepointing at the instance of the truster's daughter, in name of Todd, the judicial factor, concluding for his exoneration and discharge, and for the distribution of the trust-estate. The condescendence annexed to the summons, detailed the antecedent history of the trust, the alleged misapplication of the funds by the parties who were charged with the management of the funds previous to the appointment of the nominal raiser as judicial factor, and also contained the assertion that the nominal raiser himself had failed to discharge his duty by recovering balances due by these parties.

To this process of multiplepointing, the nominal raiser objected, *inter alia*, that it was incompetent as a mode of exonerating a judicial factor; that a judicial factor ought never to be forced into Court while the purposes for which he was appointed are only in the course of being accomplished, and while, as in the present case, none of the parties interested have made any objections to his proceedings, though they have had ample opportunity of doing so.

The Lord Ordinary, (Rutherford), "sustains the objections, dismisses the multiplepointing, as incompetent in its present form, and decerns: Reserving to the real raiser to bring an action in more competent form: Finds the real raiser liable in expenses," &c.

In a note appended to his interlocutor, his Lordship stated that "he by no means holds it incompetent to bring such an action in the name of a judicial factor, or other officer of Court, for the distribution of funds in his hands, and which are the subject of competition. . . . But on the other hand, it would seem incompetent for any party interested to make on the part of the nominal raiser, and in his name, judicial statements which the nominal raiser not only does not make, but is not bound to make, and which, on the contrary, he has the most material interest in denying. . . . The action might have been very well brought, stating the trust and the appointment of the judicial factor, and assuming his willingness to account for the funds in his possession, or those which he ought to have recovered in the due discharge of his office. The nominal raiser could not have objected to that general statement, and no more was necessary for the real raiser, or any other party interested in the competition. But it seems a great abuse of the privilege of bringing an action in another party's name, to make him conclude against himself, by admitting and pleading failure in the discharge of his duty."

Against this interlocutor the real raiser reclaimed.

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Donaldson and Neaves, for the reclaimer, supported the competency of the process, and referred to *Ker v. Gulland*, 31st Jan. 1840, 2 D., 506; *Rankin v. Kirkwood*, 6th March 1845, 17 Jurist, 292; *Deuchar v. Mackenzie*, 13th Feb. 1830, 8 S., 523; *Cumming v. Hay*, 28th Feb. 1834, 12 S. 508; *Ronaldson v. Johnstone*, 11th Dec. 1834, 13 S. 180.

Dundas and the *Dean of Faculty*, for the respondent.

LORD FULLERTON. I cannot say that I have any predilection for this form of distributing funds; at same time, I do not see any objection to its competency. The Lord Ordinary seems to admit its competency, and to proceed on the ground that things are put into the mouth of the nominal raiser which he is not called on to adopt. I cannot say that it strikes me in that way. I do not see any thing offensive or incompetent in this summons, and the pleas of the real raiser. It is a very convenient form of proceeding. There have even been cases in which the liability of a trustee has been discussed for enormous sums which were altogether denied in this form. Unless you put it on the special ground of the raiser being a judicial factor, I do not see how you are to get over these cases.

LORD CUNINGHAME. I am much impressed with the importance of the ground on which the Lord Ordinary proceeded in pronouncing this interlocutor, and go farther than his Lordship in admitting that any multiplepounding can be brought in name of a *judicial factor* by any single beneficiary, during the subsistence of his office, more especially when recently appointed, and when no complaint has been urged against him in the summary application under which he was appointed.

In the first place, I cannot dissent from the Lord Ordinary, when he refers to the condescendence put by the real raiser as highly inconsistent and incompetent, as the statement of the nominal raiser, an officer of Court, put into his mouth without his consent. On that point I need not refer to the reports, as my experience of practice reminds me of innumerable cases of this class, in which parties have been allowed successfully to object to processes of multiplepounding, attempted to be supported by narratives in summonses and condescendences, which the nominal raisers have rejected and repudiated. I am of opinion that such actions were properly viewed with jealousy. Any man holding a trifle of a claim might raise a multiplepounding in name of another, and advance the most false and absurd statements in his name.

But, in the next place, even if the first action and the summons and condescendence had been less exceptionable than they are, I cannot exactly agree with the Lord Ordinary that the present process might be made a fit or competent mode of calling the judicial factor to account in different censurable cases. These must be rare exceptions from the proper and competent course. No doubt, special cases may be figured, where, after long neglect, or in the change or disappearance of claimants and their heirs, and other emergencies, a multiplepounding in name of a judicial factor, or of bankers in whose hands he had been appointed to deposit funds after his exoneration, may be sustained by authority of the Court as the proper mode of dividing safely a fund, otherwise attached or claimed by a doubtful creditor. But that would be a

Mar. 2. 1853. special case, essentially different from the present. This is truly a process of count and reckoning against the judicial factor, undisguisedly brought for challenging his whole judicial management. It is apprehended that this can only be done in an application for having the factor's accounts audited and adjusted under his factory in common form. Without laying down any abstract proposition as to the circumstances in which a process of multiplepointing, in a *judicial factor's* name, may be sustained, I am clear that it is not in the circumstances and for the purpose indicated in the summons and condescendence now before us. I am of opinion, therefore, that the interlocutor of the Lord Ordinary should be adhered to, in so far as it dismisses the action, without prejudice to the real raiser, or others interested, taking such steps as they may be advised, to call the judicial factor to account for his intromissions, in proper and competent form.

LORD IVORY. I am of the last opinion. There have been various objections to the pursuer's proceeding, which have been sustained in practice. I have known several cases in which the objection has been sustained before the Lord Ordinary, to a multiplepointing proceeding, on the footing of neglect of duty by a public officer. That is an objection which arises from the peculiar relation between the party and the Court. The judicial factor holds the estate *in manibus curiae*, and the Court only can deal with him in the way of discharge. Now, what is he called on to do here? To appear before the Lord Ordinary, who is not the Court; perhaps to consign the fund in the multiplepointing, and to take his discharge from the Lord Ordinary. If he had been compelled to consign, I do not know how the proceeding in the factory could be extricated. He has been compelled to come here notwithstanding the proceeding before the Lord Ordinary. There are cases where a judicial factor may raise a multiplepointing, in which misconduct is not liable to challenge. But I think the process liable to another objection. A multiplepointing is a process of competition and distribution. The theory is, that the person holding the fund comes into Court and asks his own discharge on once and single payment. If he does not do it, it is competent for any of the competing parties to raise it in his name; but the process does not change its character when any party, other than the real holder, raises the process. He is generally entitled to expenses; and why? Because he acts for the general interests. But if he makes the process for his own interest, in which he denies that the holder has done his duty, he is not entitled to his expenses, nor to state any plea to that effect. Here the statement is a claim for the party, and in the worst possible shape, for he might afterwards claim in the general competition. These pleas in law are not technically put forth in the name of the party who really states them. In the third place, this multiplepointing does not condescend on any fund whatever. The real raiser just makes a multiplepointing the vehicle for a count and reckoning. I cannot see a case of double distress; and, therefore, the process is properly dismissed.

LORD FULLERTON. If the case is put on the ground that the holder is a judicial factor, I am not disposed to differ, for there is a great deal in the difficulties stated by Lord Ivory.

The LORD PRESIDENT concurred.

The Court, therefore, "recal the interlocutor of the Lord Ordinary re-
 claimed against; but in respect of the matters introduced into the summons
 of multiplepinding, and the pleas annexed, and especially in respect that
 these matters involve a question as to the general conduct and liabilities of a
 judicial factor acting *qua* such: Find that the summons as framed, is irregular
 and incompetent; therefore dismiss the action and decern: Find the real
 raiser liable in expenses, including those of opposing the said reclaiming
 note," &c.

William Mackersy, W.S., Reclaimers' Agent.

W. & J. H. Mackenzie, Respondent's Agents.

(J. S. M.)

ROBERT SHAW ANDREW AND OTHERS v. SIR JAMES
 COLQUHOUN.

No. 143.

*Act of Sederunt 24th December 1838, sec. 7—Bill Chamber—Suspension—Certificate of
 no Caution—Reclaiming Note.*—Where a note of suspension had been passed on juratory
 caution, and afterwards a certificate of no caution had been issued after the expiry of an
 extended period for granting it, the complainer presented a note to the Lord Ordinary on
 the Bills, explaining why caution had not been found, and concluding to have it now re-
 ceived. This note the Lord Ordinary refused as incompetent. The complainer re-
 claimed:—*Held*, that such a reclaiming note, if not absolutely incompetent, could only be
 entertained on very special circumstances, which did not here arise.

Ante, p. 82.

This was a suspension of a decree of removing, passed on juratory
 caution, and was reported by the Lord Ordinary, (Curriehill), in December
 last. His Lordship thereafter "having advised with the Lords of the First
 Division, and the respondent having declared that he would be satisfied as
 far as the minor is concerned, with the oath and enactment of one of his
 curators; appoints the oath to be emitted, and the enactment given in for
 the minor by one of his curators, and grants commission to the Judge Ord-
 inary of the bounds to take his oath, and that of the other complainer, anent
 juratory caution in common form." The complainer not having implemented
 this interlocutor within the period of fourteen days, prescribed by the Act of
 Sederunt, the Lord Ordinary on the Bills allowed him, on application to that
 effect, five days further to find juratory caution, "with certification, that if
 not then found, the clerk shall issue a certificate without farther interruption."
 Caution was not found, and accordingly a certificate of no caution was
 issued. The complainer thereupon presented a note to the Lord Ordinary,
 containing an explanation of the reason why caution had not been found
 within the extended period of five days allowed him, and stating that the
 oath had subsequently been emitted, and the bond of caution lodged; and the
 note concluded that caution should be allowed to be received, that the certi-
 ficate of no caution should be recalled, and the complainers allowed to proceed
 with the suspension as if no such certificate had been issued.

Answers were lodged objecting to the competency of this application, and
 stating that if the complainers be serious in their attempt to find caution, they
 should have applied for an extension of time,—not having done so, and the
 certificate having been issued, they are now out of Court.

The Lord Ordinary, "refuses this note as incompetent, reserving to the

Mar. 3. 1853. complainer to present a second note of suspension in terms of the Act of Sederunt 24th December 1838, sec. 7, if so advised.
 Andrew, &c.
 v. Colquhoun. The complainers reclaimed."

P. Fraser, for the reclaimers. Where no caution is offered, it is competent to reclaim. Beveridge on the Bill Chamber, sec. 178, p. 40. The complainer is not out of Court, and is he not to have the same remedy against the clerk granting a certificate as against the Lord Ordinary refusing the note.

Neaves, for the respondent, referred to the Act of Sederunt 1799, sec. 5. By Act of Sederunt 1828, sec. 17, power is given to apply for prorogation. Beveridge on the Bill Chamber, sec. 308, p. 67. The process is out of Court, *Nairn v. Spence*, 7th July 1824.

The LORD PRESIDENT. The application to the Lord Ordinary is a very unusual one. I do not say that it is incompetent, although I have not seen a case in which the special circumstances would warrant its being granted. There was another remedy open to this party, under sec. 7 of the Act of Sederunt, by presenting another bill on payment of previous expenses. But he says, I shall not be trammelled by the condition attaching to that remedy, and he refuses to resort to it. This is not the proper course, and therefore I am not disposed to disturb the interlocutor of the Lord Ordinary in regard to it.

LORD FULLERTON. I am of the same opinion. I never heard of such a reclaiming note, and certainly it would require very special circumstances to grant such a thing so far out of form as this. There are not here such special circumstances, and I am not disposed to continue the litigation longer by granting the application.

LORD CUNINGHAME and LORD IVORY concurred.

The COURT therefore "adhere to the interlocutor of the Lord Ordinary submitted to review, and refuse the note."

David Crawford, S.S.C., Complainers' Agent.

Tawse and Bonar, W.S., Respondent's Agents.

(J. S. M.)

No. 144.

PETITION, FRANCIS EDMOND.

12 and 13 Vict., cap. 51, § 22—*Pupils' Protection Act*—Factor—Discharge—Subsisting Factory.—Where a factory had expired previous to the passing of the Pupils' Protection Act, but the factor had thereafter for some years continued to manage the minor's estate as agent, he not having been discharged as factor, although his factorial accounts had been rendered and approved of:—*Held*, That his management as agent being approved of by the minor and her curators, whom she had subsequently appointed, his proceedings during that period were not to be treated as under a subsisting factory; therefore, that the Pupils' Protection Act did not apply to them, and that the factor was not bound to account to the Accountant of Court before receiving his discharge.

This was a petition at the instance of a judicial factor for exoneration. His tutorial powers had expired in November 1848. He then lodged accounts of his intromissions during the period of his factory with the Accountant of Court, who reported them to be correct, a balance being due to him of £68 : 4 : 8. His petition now set forth, that immediately upon Miss Shaw, the pupil to whom he had been appointed factor, attaining minority, the petitioner urged upon her the propriety of choosing curators, and he delayed ap-

1st Division.

Mar. 4. 1853.

Petition,
Edmond.

plying for exoneration until she should do so. She had not, however, followed Mar. 4. 1853. that course; and as the petitioner is now anxious of being exonerated of his factory, he had rendered to Miss Shaw all his accounts during the period of his factory, as the same were audited by the Accountant of Court, and she, with concurrence of her paternal aunt and only near relative, *valens agere*, had docquetted the accounts and granted a discharge to the petitioner of all his intromissions as factor, which were now produced. Since the termination of the factory in 1848, the petitioner, at the request of Miss Shaw and her aunt, had continued to take a charge of her affairs as her agent, and had received payment of the balance of £68 : 4 : 8. Accounts of the petitioner's intromissions as agent from November 1848 to the date of presenting this petition, had been rendered to Miss Shaw, and had been examined and docquetted as correct by her and her aunt. These accounts were also now produced along with the petition. The petitioner in these circumstances, with concurrence of Miss Shaw, now applied for exoneration, and for delivery of his bond of caution.

Petition,
Edmond.

Subsequent to the presenting of this petition, Miss Shaw chose curators, who expressed their satisfaction with the factor's accounts.

The Court remitted the petition to the Lord Ordinary, to enquire into and report thereon, and his Lordship remitted the same to the Accountant of Court. Various proceedings then took place, and several reports were lodged by the Accountant, the purport of which was, that founding on § 22 of the Pupils' Protection Act, 12 and 13 Vict., cap. 51, passed in July 1851, the Accountant held the petitioner bound to account to him under the statute down to the date when the minor and her curators entered into possession of the estate, and that until he should do so he could not competently be discharged. The words of the statute founded on by the Accountant were the concluding words of § 22 :—"And in all other respects the whole provisions of this Act shall take effect from and after the passing thereof in regard to factories constituted before the passing of this Act, in so far as the same admit of application thereto." And so applying the statute, the Accountant charged the petitioner with penal interest to the extent of £20 : 13 : 9, upon a balance in excess of £50, which was in his hands from 11th June 1850 to 17th November 1850.

The Lord Ordinary having made *avizandum* to the Lords of the First Division, the case was called to-day.

The *Dean of Faculty* appeared for the factor, and maintained that the statute did not apply. This was not a subsisting factory at the date when the Act was passed.

The LORD PRESIDENT. I cannot say that I feel any difficulty with regard to the point now put. It is, whether under the provisions of this Act, penal interest is exigible. I am of opinion that the demand for penal interest is not a good demand. The factory had expired before the date of the Act. It was, therefore, not within the scope of the Act at all. There may be matters which took place before the Act came into operation, as to which nice questions may be raised as to the applicability of § 22. But this is not one of them, for this factory had expired before the Act had come into operation; and therefore I think that this penalty, which arises out of the

Mar. 4. 1853.

Petition Edmond.

Act entirely, is not exigible. But although the factory had expired it had not been discharged; and therefore, if previous to the discharge it had appeared that any improper investment had been made while there was nobody to call the factor to account, I am not prepared to say that in that state of matters the Court would not have had cognizance of the case. But here we are out of that question altogether. The party is now in the condition of acting for herself, and she and her curators are satisfied with the investments which the factor has made. The matter of investment, therefore, is not now before us, and I am satisfied that penal interest is not applicable to this case.

LORDS FULLERTON and CUNINGHAME concurred.

LORD IVORY. This factory is expired before the statute came into existence, and when it expires the balance is in favour of the factor. If it had been otherwise it may be a question whether § 22 does not apply to all factories existing before the passing of the Act, and to all which may be considered settled but not formally so, and it might not have been the duty of the accountant to have called the factor to account for the balance which was in his hands. But, if before this statute came into effect, the factor has not only discharged all his duties as factor, but remained the creditor of the pupil, I think it would be a strong thing to hold that what was done afterwards is to be dealt with as if still under the factory. To extend the penalties to such cases would be most unjust, as it would be unsafe to act on the view of the Accountant.

The COURT, therefore, "exoner the petitioner, Francis Edmond, and his cautioner, of the act of factory foresaid, and of his intromissions as factor *locoutoris* to Elizabeth Ogilvy Shaw, above mentioned: ordain the custodier to deliver up the said petitioner's bond of caution, and decern."

Lockhart, Morton, Whitehead, and Greig, W.S., Petitioner's Agents.

Walter Duthie, W.S., Agent for Curators.

(J. S. M.)

No. 145.

ORR v. FLEMING AND FORRESTER.

Liability.—The owner and the custodier of a dog, found liable in the value of sheep destroyed by him while trespassing in a neighbour's field, although the dog was not alleged or proved to have previously shewn any tendency to injure sheep.

2d Division.

Mar. 6. 1853.

Orr v. Fleming &c.

This was an advocacy by the defenders of a judgment by the Sheriff of Dumbarton, finding them liable in the value of eighteen sheep, the property of the pursuer, which had been killed by dogs while pasturing in the pursuer's own enclosed fields. It appeared that two dogs had been seen in such circumstances as to leave no doubt that they were the dogs who killed the sheep. One of them could not be traced or discovered, but the pursuer led evidence in the Inferior Court to prove that the other was a young foxhound, the property of one of the defenders, Mr Fleming of Biggar and Cumbernauld, and in the custody of the other defender, Forrester, who allowed it to run about his farm.

The case was brought directly to the Court without a judgment of the Lord Ordinary.

E. S. Gordon, for the defender, contended, 1st, That the identity of the dog was not proved. 2d, That assuming the guilt of the dog, it not being averred

or proved that he had previously shown any disposition to attack sheep, his owner and custodier were not liable for the mischief done. Both the Scotch and the English law were originally founded on the law of Moses in this matter; see the 22d chapter of Deuteronomy, as to injury done by an ox not "known to have been wont to push in past time." Stair, p. 195; Toddridge, Brown Suppl. iii.; Elchie's Rep., *voce* Reparation, No. i.; Brown & Co., 26th June 1824; Gray v. Brassey. . . . All the English authorities were clear on this point.

Baillie, for the pursuer, after adverting to the evidence, maintained, that in the English cases the animals were under the immediate care of their masters; here the dog was wandering and trespassing, and if *culpa* on the part of their keeper was necessary, it was to be found in their being allowed to trespass. It was not a case of pure accident.

The LORD JUSTICE-CLERK. On the facts, I am of opinion that it has been proved that Mr Fleming's foxhound was one of the dogs which destroyed the sheep. As to the liability of the owner and of the farmer in whose keeping and care the foxhound was, for this extensive loss,—eighteen sheep,—there is, I apprehend, no doubt in the law of Scotland. I lay aside entirely the cases and authorities from the law of England. This dog was an untrained foxhound. The sheep were in an enclosed field above a mile from the farmhouse where the hound was. It is not proved that there was any arrangement for looking after the dog, or regular place where he was to be locked up at night. He was clearly allowed to go about as he chose. That afternoon he was hunting about with another dog at a distance. He was trespassing, and no care taken to prevent it. The liability then, in law, for the acts of the dog, is, I am of opinion, clear. I should even have held the defender liable if the dog had been better looked after, and if the single fact had been, that he had somehow got loose, and worried the sheep in this enclosed field.

LORD COCKBURN. I hold the fact proved. As to the law, I have always thought, that if a dog worries sheep, his master is liable. I do not attach any weight to the law of England. I am told that, in justice, knowledge on the part of the owner is requisite to make him liable. This is absurd; he cannot know it until it is done. This would allow each dog to have one worry with impunity. *Negligence*, no doubt, is always the ground of conviction, and here there was negligence, and so there is in the case of *all* dogs left at large. *All* dogs tend to kill sheep. Such has always been the usage and understanding in Scotland. In the Sheriff courts such cases are decided every day, and no such defence is ever thought of.

LORD MURRAY. I plead guilty to ignorance of the law, except as I learn it from our great institutional writers, and from decisions of the higher courts. I cannot hold Lord Stair, Mr Bell, and all the others to be of no authority, and that we are to hold the law to be perfectly clear in the face of their *dicta*. No authorities have been quoted to us on the side of the pursuer, and I cannot admit the practice of the Sheriff courts to be of any weight. I do not found upon the law of England, though I believe that it is the same as our own, and also the civil law. I have also some doubt as to the facts being proved. I am therefore compelled to differ from your Lordships.

LORD WOOD concurred with the majority.

Mar. 6. 1853. The COURT therefore "Repel the reasons of advocacy, adhere to the interlocutor complained of, and repeat the findings therein," &c.

Orr v. Fleming
&c.

Lockhart, Morton, Whitehead, & Greig, W.S., Pursuer's Agents.

G. and G. Dunlop, W.S., Defenders' Agents.

(W. H. T.)

No. 146.

PETITION, MRS ANN GRAY OR BANNERMAN AND OTHERS.

Curator bonis—Petition—Expenses.—Circumstances in which a petition for the appointment of a *curator bonis* being opposed and allowed to be withdrawn, expenses were allowed to neither party.

1st Division.

Mar. 8. 1853.

Petition,
Bannerman.

This was a petition for the appointment of a *curator bonis* to Miss Mary Grant Roy, at the instance of certain of her relations, with whom she had formerly lived, on the allegation that Miss Roy was deaf and dumb, and of a facile disposition, which required to be rigidly controlled. The petition set forth, that Miss Roy had been educated at the deaf and dumb institution; and that afterwards the petitioners had been requested to receive and board her, to which they agreed. That the petitioners had applied to Mr Kennedy, W.S., to arrange her affairs, and that for many years he had accordingly drawn her income, paid the board, and managed on Miss Roy's behalf.

That in September last, a small succession of about L.120, opened to Miss Roy, who imagined that a great fortune had become hers, and became difficult of control. That a Mr Gordon, who had never shewn her any kindness before, had since induced her to reside with him, and that the petitioners have good reason to suppose that Miss Roy is detained against her wishes by Mr and Mrs Gordon, who have employed a man of business to write to Mr Kennedy not to pay the board due to the petitioners for the last quarter, and also to deliver up Miss Roy's papers, and his accounts. That the petitioners are prepared to prove that Miss Roy is, by reason of her natural infirmities, and her great facility and feebleness, unable to take unaided care of her own affairs, and is liable to be imposed on by designing persons. That Mr and Mrs Gordon had refused access to medical gentlemen to examine her, and that in these circumstances an application for a curator or factor is absolutely necessary for the security of Miss Roy's small estate, and the safety of her person. There was appended to this petition a certificate by Dr Kinniburgh, to the effect that Miss Roy is deaf and dumb, and of such a facile disposition as to be entirely unable to manage her own affairs.

To this petition, answers were lodged in name of Miss Roy, denying the allegation in the petition, and stating that the whole infirmity she labours under, is a partial deficiency in the sense of hearing, and a difficulty in articulating words, and that she does not labour under incapacity to manage her own affairs. It was also set forth that Mr and Mrs Gordon are related to her in the same degree as the petitioners, and that her residence with them was of her own desire and accord; and that therefore the petition ought, *de plano*, to be refused.

The COURT remitted to the Sheriff of the county to visit Miss Roy, and to inquire, and take such assistance as he should think proper, and report; and the Sheriff's report now bore that he had heard Miss Roy speak articulately; that he was quite satisfied that she distinctly heard and understood him when

he spoke to her, and that his opinion was in favour of her capacity to administer her own affairs. A medical report was subjoined to the same effect. Mar. 8. 1853.

The case was called to-day; when—

Petition,
Bannerman.

Craufurd appeared for the petitioners, and stated that in the proceedings adopted by them, they had been actuated by a regard merely for the best interests of Miss Roy, but that after the terms of the Sheriff's report, they did not desire to press the petition, and therefore now moved for leave to withdraw it.

Fraser, for the respondent.

The Court, "on the motion of the counsel for the petitioner, allow the petition to be withdrawn, and find no expenses due to either party," &c.

John Kennedy, Jr., W.S., Petitioner's Agent.

John Murray, S.S.C., Respondent's Agent.

(J. S. M.)

EDINBURGH AND GLASGOW RAILWAY v. ADAMSON AND OTHERS. No. 147.

This case related to the mode of assessing a railway for the support of the poor of the parishes through which the line of railway passes; and the point was decided that the stations at each end of the line, and also along the line, are not to be assessed separately in the several parishes in which the same are respectively situated, but are to be valued as forming a part of the whole railway, the value whereof is to be apportioned under section 45 of the Poor Law Act. 1st Division.
Mar. 9. 1853.
Edin. & Glas.
Rail. Co. v.
Adamson, &c.

For report of the case, see *infra*, under date 1st April.

THE GREAT NORTHERN RAILWAY COMPANY v. INGLIS.

No. 148.

Railway shares—Arrears of Calls—Cancellation—Liability.—In an action at the instance of a railway company against a shareholder, for payment of arrears of calls on certain shares which the company had afterwards cancelled—the shareholder having been found liable for the sum sued for:—*Held*, that in accounting with the railway company, he was entitled to get credit for the market value of the shares, as at the date of cancellation, but not of preferable shares issued in lieu of those that were cancelled.

This was an action at the instance of the Great Northern Railway Company against Inglis, one of the shareholders, for payment of £34, with interest, being the proportion effecting to eight shares held by him of two calls made in 1847 upon all the shareholders of the Company. Defences were lodged, a record was made up, and an issue adjusted and approved of. A trial took place, and a verdict was returned for the defender. Thereafter the Court sustained one of the exceptions which had been taken at the trial, and granted a new trial, reserving all questions of expenses. 1st Division.
Mar. 9. 1853.
Great N. Rail.
Co. v. Inglis.

In this state of matters the pursuers moved the Court to alter the issue, on the ground of an alleged change of circumstances arising out of the forfeiture and cancellation of the shares in question. The defender objected to the competency of this proceeding, and farther pleaded, that after the cancellation of the shares in question, the pursuers having issued in lieu thereof new preferable shares, by which they had raised a larger sum than what was represented by the shares in dispute, the defender is at any rate entitled to have an accounting with the pursuers, and to be allowed credit for all sums received by them in respect of the shares in question, or in respect of the new shares

Mar. 9. 1853.

Great N. Rail.
Co. v. Inglis.

created and issued in lieu thereof after the cancellation, or at least to be allowed credit for the amount of the market value of the shares at the date of the cancellation.

The Court allowed the issue to be amended as craved, and the issue was again sent to a jury, who found for the pursuers. Certain exceptions were taken, which, however, the Court disallowed. Against this interlocutor Inglis appealed. The appeal was dismissed, (*ante*, vol. I. p. 749), and the pursuers now moved the Court to apply the verdict.

Deas, with whom *Sandford* and *Macfarlane*, for the defender, argued that he was entitled to get credit for the price of the new shares issued by the Company. There is no express enactment regulating the result of cancellation. It may go the length of extinguishing the shares, and putting an end to the calls, but assuming that to be wrong, the question remains, is the defender to get credit for nothing? and if he gets credit for anything, what is it for? It must be for the price obtained for the re-issue of shares in lieu of the cancelled shares.

The *Dean of Faculty*, with whom *Young* and *Donaldson*, for the pursuers, contended that the defender could get credit only for the market value of the shares at the date when they were forfeited. The shares contemplated by the statute to be forfeited are shares in the position of those which belonged to the defender, and in respect of which the holder can never again be a partner of the Company. The effect of cancellation, therefore, is to obliterate his name from the Company's books, and his claim to obtain benefit from the re-issue of shares cannot be sustained. *The Great Northern Railway Company v. Kennedy*, 16th November 1849, 4 Welsby, Hurlstone, and Gordon's Exchequer Reports, p. 417.

THE LORD PRESIDENT. I cannot say that I have great doubt, now that we have the judgment of the House of Lords on the points that were raised there. It almost necessarily follows that the Company are bound to account to the defender for the market value of the shares as at the date of cancellation. I cannot say that the defender is entitled to insist that an accounting shall be held with him as to the shares with which he had no connection at all, issued with privileges which would make it impossible to ascertain what would have been their market value, if issued in any other way than issued with these privileges. We have not before us the data of the market value of the shares at the date of cancellation, nor what would have been the market value of new shares in the event of no privileges being attached to them. I think the proper subject for enquiry is the market value of the shares at the date of the cancellation, and that must be ascertained before we can apply this verdict.

LORD FULLERTON. I am of the same opinion.

LORD CUNINGHAME. I entirely agree with your Lordship. We are now asked to apply the verdict, which cannot be a matter of any difficulty. Perhaps the pursuers were to blame in not stating the alleged value and worth of the shares that were forfeited. The defender is entitled to that if they were worth anything, as it is not understood that the Railway Company object to account for any balance realizable on the cancelled or forfeited shares. The precise amount can be adjusted in an interlocutor before extract.

LORD IVORY. I am of the same opinion. The only element in the case Mar. 9. 1853. that I could have entertained any doubt about, is removed from it, viz., Great N. Rail. Co. v. Inglis. Whether in a rigorous construction of cancellation it must not be held to be total cancellation of all *liability*. But it is now settled law that cancellation is another shape for forfeiture, for which the previous law had provided. It just comes to this, that it allows the Company, at the market price, to purchase in those shares, which, if there had been an opportunity, they would have sold to others. If they had sold to others and could not have got more than the market price, it is right that they should not be held liable for more than that amount.

The COURT, therefore, "Apply the verdict found by the jury on the issue in this cause; Find that the defender is bound to pay the sums found due by the verdict, minus the market value of the shares as at the date of cancellation; Appoint the defender to put in by the box-day in the ensuing vacation a minute, stating what he avers to have been their market value as at that date; Find him liable to the pursuers in expenses, under reservation of the question as to the expenses of the first trial, and remit to the auditor to tax the expenses in the meantime, and to report, distinguishing in his report the expenses of the first trial."

Gibson-Craig, Dalziel, and Brodie, W.S., Pursuers' Agents.

Inglis and Leslie, W.S., Defender's Agents.

(J. S. M.)

PETITION, DONALD M'CALLUM AND OTHERS.

No. 149.

Guardian and Ward—Custody.—A testator appointed his wife during her widowhood, and his executors, to be guardians of his infant children. The widow having again married, the executors applied for the custody of her only surviving infant child:—*Circumstances* in which the testator's widow was allowed to retain custody of the child on finding caution not to remove it beyond the jurisdiction of the Court, and other conditions as to allowing it to visit its paternal grandfather, &c.

This was a petition for the custody and delivery of a ward. The 1st Division. petitioners were appointed executors of the late John Hamilton, merchant in Mar. 9. 1853. Calcutta, by his last will and testament, which also contains the following Petition, M'Callum, &c. provision: "Lastly, I appoint my said wife during her widowhood, and my said executors, to be guardians of my infant children." After Mr Hamilton's death, his widow came to Scotland, and married a gentleman, "who in the opinion of the petitioners, was not a suitable match for her, and in so far as they are aware, has no sufficient means to maintain a family." Being informed that Mr and Mrs Macdonald intended to leave Scotland for Australia, the petitioners considered it necessary to take measures to have the child removed from the charge of her mother, and her husband, both because it appeared to them that the will of the deceased Mr Hamilton appointed his wife to be one of the guardians of his children only during her widowhood, and also because her second husband was unknown either to them or to the late Mr Hamilton, and a person in whom they had no grounds for reposing any confidence. Therefore the petition prayed to have the child placed under the charge of her paternal grandfather, residing in Glasgow, or such other qualified person residing within the jurisdiction of the Court, as the Court might think proper

Mar. 9. 1853. to appoint. Answers were lodged to this petition by Mr and Mrs Macdonald; and the Court, after hearing parties, superseded the cause, with reference to a proposal that Mrs Macdonald should find caution that the child should not be removed from Scotland. That bond having been now prepared and adjusted, containing, besides the cautionary obligation, the right to retain Mrs Macdonald's jointure under her first marriage as a farther security:—

Petition,
M'Callum, &c.

The Court pronounced the following interlocutor:—"The Lords having resumed consideration of this petition, with the answers given in thereto, and the respondent, Mrs Macdonald, having found security not to remove the child, Matilda Agnes Hamilton, out of the jurisdiction of the Court, find the said respondent, Mrs Macdonald, entitled to retain the custody of the child for twelve months, from 5th February 1853, but subject always to the jurisdiction of the Court, reserving to both or either of the parties, either on the expiry of that period, or if sufficient cause shall arise in the meantime, to apply to the Court, or to the Lord Ordinary on the Bills, during vacation, for further orders as to the custody of the child, and to both parties their pleas and defences as accords; and in the meantime, accordingly, supersede the further consideration of the petition; and the Lords further find the petitioner, Archibald Hamilton, the child's grandfather, entitled to all reasonable access to the child during said twelve months, and to receive, for fourteen days in every three months, a visit from her, in the charge of her ordinary or other suitable attendants, he defraying the travelling or other expenses occasioned by such visits, without prejudice to Mrs Macdonald and the said Archibald Hamilton making such other arrangements as to the visits as they may mutually agree upon; find both parties entitled, out of the trust-funds, to the expenses incurred by them," &c.

Christopher Douglas, W.S., Petitioners' Agent.

Lockhart, Morton, Whitehead, & Greig, W.S., Respondent's Agents. (J. S. M.)

No. 150.

HEWATSON v. IRVING.

Process—Condescence, additions to, in revised condescence.—It is improper for a pursuer, in his first condescence to reserve essential facts, so as to necessitate there being added in the revised paper. He may make such additions, however, as well as add entirely new averments of the same nature as those originally made, on payment of expenses

2d Division. This case was verbally reported by Lord Anderson, on the following point.
Mar. 9. 1853. The action being one of damages for slander, the pursuer had added,—in his revised condescence,—two entirely new instances of alleged slander, uttered at different times, different places, and in presence of different persons, from the instances averred in the condescence attached to the summons. Moreover, in some of the instances averred in the original condescence, he had left the names of the persons in whose presence the slander had been uttered, blank, reserving to himself the power to specify them afterwards.

Hewatson v.
Irving.

G. Young, for the defender, objected to the competency of making these additions in the revised condescence.

Maidment, for the pursuer.

The Court intimated their disapprobation of the practice of reserving *essentials*, in such a manner as to make additions in the revised paper neces-

sary. The additions, however, were allowed to be made, on the payment of expenses to the defender. Mar. 9. 1853.

R. Arthur, S.S.C., Pursuer's Agent.

Joseph Mitchell, W.S., Defender's Agent.

(W. H. T.)

*Hewatson v.
Irving.*

**STEEL OR NEWBIGGING AND OTHERS v. PURCELL'S TRUSTEES, AND No. 151.
STEEL AND ELDER v. PURCELL AND OTHERS.**

Vesting—Trust-Disposition and Settlement.—A. left a trust-disposition and settlement, conveying his whole estate, heritable and moveable, to B. in trust, whom failing, to C. in trust. The purposes were, the payment of certain small annuities, which, on the decease of any of them, were to go to the survivors, after which, the free residue to “belong to B. during his life;” on decease of B., C., who should then be trustee, was to encrease the fore-said annuities to a limited extent, and the free annual residue was “to belong” to himself; and so soon as the annuity of one of the annuitants, D., should amount by the death of the others to a certain sum, C. was to execute a bond, “binding himself” to pay the said annuity, and on the decease of D., to pay a certain sum to her children, and failing issue of her body, to himself and the heirs of his body; Lastly, after executing the purposes of the trust, the free residue was to pertain to C., and the heirs of his body, whom failing, D., and the heirs of her body, whom failing, the testator's own heirs and assignees whatsoever. B. having died, C. managed the trust for some years, and died, leaving a trust-disposition conveying all estate which should belong to him at his death, in favour of certain beneficiaries:—*Held*, that the trust-estate of A. vested in C., so as to make his deed effectual.

The late George Warroch, by trust-disposition and settlement, conveyed to 2d Division. his brother James Warroch, failing whom by death, Dr John Warroch Mar. 9. 1853. Purcell, his nephew, as trustees, his whole property, heritable and moveable, for the following purposes; 1st, For payment of debts, &c.; 2d, For pay- Steel, &c. v. Purcell's Trustees, and Steel, &c. v. Paxton Purcell; declaring that on the decease of any of the other annuitants, their annuity should belong to the survivors, Catherine Paxton Purcell's annuity never exceeding £40; and after payment of said annuities, the free annual produce to belong to the said James Warroch during his life; 3d, On the decease of James Warroch, Dr Purcell, who was then to be trustee, to pay an additional annuity to the sisters and niece, and after payment thereof, the free annual produce to belong to Dr Purcell himself; 4th, So soon as the annuity to Catherine Paxton Purcell should amount to £40, Dr Purcell was directed to execute a bond, binding himself to make payment to her of that sum yearly, in full of her share of the trust-funds, and after her decease to pay to any child or children of her body £800, equally among them, or as she should provide, and failing issue of her body, to himself, or the heirs of his body, whom failing, to the testator's own nearest heirs or assignees; 5th, After executing the purposes of the trust, the free residue to pertain to Dr Purcell, and the heirs whatsoever of his body, whom failing, Catherine Paxton Purcell, and the heirs of her body, whom failing, the nearest heirs and assignees of the testator.

The testator died in 1803, unmarried and without issue, and James Warroch, declining to accept the trust, it fell to Dr Purcell, who managed it till his death in 1835. He died without issue, leaving a trust-disposition in favour of the defenders in the first of these actions, as trustees, conveying to

Mar. 9. 1853.

Steel, &c. v.
Purcell's Trustees,
and
Steel, &c. v.
Purcell, &c.

them all estate which should belong to him at his death. They were directed to pay the annual proceeds to his father and mother during their lives, and on the death of the longest liver of them, to Catherine Paxton Purcell, now Mrs Gowan, and upon her death to denude and convey the trust-funds to her children, as she might have directed; failing whom, to the children of three cousins named in the deed.

In 1837 Mrs Gowan executed a deed of factory in favour of Dr Purcell's trustees, narrating that the management of George Warroch's trust had devolved upon her, and appointing them to be her factors and commissioners to manage the trust-estate, and also certain trust-funds left by her other uncle James Warroch. These trustees, in 1840 and 1841, made up titles in Mrs Gowan's person to several of the heritable subjects which formed part of George Warroch's trust-estate, having caused her to be served heir of line and of conquest to him.

Mrs Gowan died in 1849 without issue, and leaving no settlement which could affect these heritable subjects.

In these circumstances, certain actions were raised by various parties claiming an interest in the property. These processes, however, being in a shape which was inadequate to extricate the question, *in whom, and when*, the heritable portion of George Warroch's estate had vested, it became necessary to raise the present actions. The first was at the instance of Mrs Grace Steel or Newbigging and several others, all children of the three cousins of Dr Purcell, above mentioned, as being the last named persons in his trust-deed, against the trustees, and also against John Purcell, the heir-at-law of Mrs Gowan. They concluded for declarator that the heritage in question belonged to them in virtue of Dr Purcell's trust-deed, and that Mrs Gowan had made up titles to it only in trust for them, and that her heir should now denude in their favour; or, should it be found that Mrs Gowan had taken possession of it in fee-simple, they concluded for reduction of her titles (if necessary), and for adjudication of the subjects. The second action was at the instance of Steel and Elder, who, in the character of heirs-at-law of George Warroch, claimed the residue of the estate, so far as heritable, maintaining that it had never vested either in Dr Purcell or in Mrs Gowan. These actions were conjoined.

The Lord Ordinary (Anderson) pronounced an interlocutor, finding that "according to the true construction and meaning of the late George Warroch's trust-deed and settlement, the fee of the free residue of the trust-funds became vested in the now deceased Dr John Warroch Purcell." "That the right, which had so vested, was effectually conveyed by his trust-disposition and settlement, dated 26th March 1822, for behoof of the beneficiaries therein named." "That a title to heritable subjects formerly belonging to the said George Warroch was made up in fee-simple by the late Catherine Paxton Purcell or Gowan." "That the defender John Purcell, who is her nearest and lawful heir, is bound to convey over the said heritable subjects for distribution, in terms of the said Dr Purcell's trust-disposition and settlement."

The defences for Elder and Steel, and for John Purcell, in the first action, were repelled, and, in the second action, the defences were sustained.

John Purcell reclaimed; for whom *Duff*, and *Deas*.

Donaldson, and *G. G. Bell*, for Steel and Elder.

Müller, *Moir*, and *Neaves*, for Steel or Newbigging, and others.

Without waiting for the reply by the counsel for the pursuers, Steel or Newbigging, &c.,—

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The LORD JUSTICE-CLERK announced, that it was quite clear to the Court that the estate had vested in Dr Purcell at some period before his death, at what time, it was, at the present stage of the proceedings, unnecessary to decide.

The Court, therefore, adhered to the interlocutor of the Lord Ordinary.

James Carnegie, jun., W.S., Agent for John Purcell.

R. Oliphant, S.S.C., Agent for Steel and Newbigging, and others.

W. Traquair, W.S., Agent for Steel and Elder.

A. Smith, W.S., Agent for Purcell's Trustees.

H. J. Rollo, W.S., and *R. Smith*, S.S.C., for other parties. (W. H T.)

SMITH v. GREEN.

No. 152.

Damages—Wrongous Imprisonment—Malice and Probable Cause.—In an action of damages on the ground of wrongous apprehension, the defender at the trial maintained that the case was one of privilege, and that the pursuer must prove malice and want of probable cause, and that there was no evidence to go to the jury on these points. The presiding Judge sustained this plea, and directed a verdict to be given accordingly:—*Held*, in a bill of exceptions to this ruling, that the circumstances of the case did not disclose a case of privilege, and that the pursuer was entitled to a new trial.

This was an action of damages which went to a jury on the following verdict:—"Whether on or about the 14th day of April last, and at or near Smith's Place, Leith Walk, near Edinburgh, the defender wrongfully apprehended the pursuer, or caused him to be apprehended and taken to the police office, at or near the foot of Leith Walk, to the loss, damage, and injury of the pursuer? Damages £300." It appeared that the pursuer and the defender both attended a sale of furniture at a house in Leith Walk, that a dispute arose as to getting into the room, and, according to the allegation of the pursuer, he "politely requested the defender" to allow him to pass, but being still resisted by the defender he "gently pushed past the defender into the room." The defender then gave the pursuer into custody. At the police station the defender "being called upon to state his charge against the pursuer, he stated no charge whatever, and gave no reason or ground for his having caused the pursuer to be so apprehended and lodged in the police station," whereupon the pursuer was released. The pursuer, accordingly, raised this action of damages for the injury alleged to have been thus done to his "person, estate, credit, character, reputation, and feelings."

The defender's statement was to the effect that he was accompanied by two ladies; that he was roughly assaulted by the pursuer in his attempt to force his way into the room; that "on the defender interfering for the protection of the ladies who were with him, the pursuer in a menacing attitude, threatened the defender with personal violence;" that this alarmed the ladies; that "in these circumstances the defender thought it to be a duty he owed to the public not to allow such an outrage on the recognized usages of civilized society to pass unpunished; that he accordingly gave the pursuer in charge,"

1st Division.

Mar. 10. 1853.

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Mar. 10. 1853. tenable grounds. But what was first alleged to be his crime? No man can say what it was; and that accounts for the defender *abandoning* every charge after the pursuer was carried to the police-office. This having been the conduct of the defender, the only inquiry here is, if he was entitled to be absolved on the grounds stated in the bill of exceptions? The rules and forms of our issues are well settled to state when the defence is competent or proper; and your Lordship's remark is entitled to great weight, that when a plea of privilege is to be raised by a defender, this should be articulately set forth in the record, whether made a condition of the issue or not. But there was no such previous averment or plea here. The whole proof shews a fabricated and colourable charge to intimidate and bully the pursuer. If such a proceeding were sustained and vindicated on the score of privilege, the liberty of the subjects might often be put to hazard, as there is seldom a crowded meeting held, such as in theatres, assemblies, or even churches, where similar charges might not be preferred, and respectable citizens handed over to the police for pressing too closely for admittance. Finally, if the want of probable cause and malice on the part of the defender were required to be proved, (which I doubt), these points might safely have been left to the jury, who could not fail to have found in the admissions of the defender and record, materials for ascertaining the facts.

LORD IVORY. I am of the same opinion. I think this is a most important case as regards the liberty of the subject. I should have been distressed, indeed, if the Court had been obliged to come to another conclusion. I have no sympathy with that argument, founded on the rigorous construction of some principle of law which would find privilege in a case of this kind. Even if this had been a case of privilege properly disclosed in evidence, it was a miscarriage on the part of the Judge to withdraw the case from the jury. The question of malice and want of probable cause is always one of degree, and the more eminently so, where it is a matter connected with the evidence, and only coming out in the course of the trial. A Judge is not entitled to withdraw a case unless the evidence be such, that if a different verdict had been found, the Court would have been justified in quashing it. In this case privilege is pleaded, not in a case of assault on the defender, as alleged in record, but in a case of supposed insult and injury to ladies; therefore on the evidence as disclosed, I hold that the plea of privilege founded on it, is not such, as with reference to the statement on record, was relevant to be so stated. Looking to the circumstances disclosed in the evidence here, I considerate the statement of any tangible offence. I concur with the views stated, and I hope that such a result will go forth, and teach the community that they must command their passions, and not be too rash in giving their neighbours into custody.

The COURT "allow the exception, set aside the verdict in this cause, and grant a new trial, reserving consideration of the point of expenses till the final settlement of the cause."

John Robertson jun., S.S.C., Pursuer's Agent.

William Skinner, W.S., Defender's Agent.

(J. S. M.)

PETITION, DAVID KIDD and OTHERS.

No. 153

Burgh Election—Challenge—Reduction—Disfranchisement—Pendente lite—Interim Managers.—An election of burgh magistrates and councillors was reduced on the ground of certain irregularities which had taken place at it. Before the proceedings in the reduction were concluded, the time for another annual election had arrived, and the election was proceeded with. Against this election, as an illegal one, a petition and complaint was presented after the lapse of two months, and answers were lodged thereto. During the dependence of the case, application was made for the appointment of interim managers, on the ground that the reduction of the first election had disfranchised the burgh:—*Held*, that it was not necessary that the second election should be challenged within the two months, that a reduction of it was not necessary, and that the petition and complaint was a sufficient challenge, and the application for the appointment of managers regular and proper.

This was a petition at the instance of certain burgesses and inhabitants of 1st Division. the burgh of Anstruther-Wester, praying for the appointment of interim managers of that burgh. The petition was founded upon a decision of the Court, pronounced on 17th December 1852, (*ante*, p. 131), finding, that in consequence of certain irregularities at the election of burgh magistrates and councillors on 17th September 1851, that election was null and void. And the petition set forth, that the effect of that judgment being to disfranchise the burgh, and to leave it without any legal magistracy or council, and without officers having authority to attend to the various interests of the burgh, and to manage its funds and property, this application for the appointment of interim managers had become necessary. Mar. 11. 1853.
Petition,
Kidd, &c.

Answers were lodged to the petition by certain other burgesses and inhabitants, stating that the proceedings relative to the election of September 1851 not having terminated when in September last (1852) another annual period of election had arrived, it was the duty of the respondents, as they believed, to proceed to the business of the annual election in the same way as if no challenge had been in dependence. They accordingly elected certain of the respondents bailies and councillors. That against this election the petitioners in November last presented a petition and complaint, to which answers have been lodged, and the case is still in dependence. In these circumstances, therefore, the respondents submitted, that the present application for managers is premature: but if the Court should think otherwise, they objected to the persons named by the petitioners, and suggested others as better qualified for the office of interim managers.

Neaves, and *P. Fraser*, in support of the petition, referred to *Kay v. Magistrates of Dundee*, 9th March 1830, 8 S. and D. 688; *Kay v. Bell*, 11th March 1830, 8 S. and D., 719; *Marshall v. Carre*, 4th December 1782, M. 1887; *Mason v. Magistrates of St Andrews*, 29th July 1747, M. 1871; *Anderson v. Sinclair*, 28th February 1747, M. 12,157.

Deas, and *Macfarlane*, for the respondents. There is no reduction of the election of 1852. It was not challenged within two months of its date, and the legislature has said, that if not challenged within the two months, it shall not be challengeable: (*ante*, p. 216), therefore it does not follow, that because the election of 1851 was had the election of 1852 shall be set aside; *Connel*, p. 361; *Tod v. Tod*, 26th March 1827, 2 W. and S., 542.

Mar. 11. 1853. *Petition, Kidd, &c.* The LORD PRESIDENT. The point that was tried in the case of *Tod* was a quite different one from that which it is cited to support. Here the point is, whether the challenge must be within two months of that which was done by parties whose right to do it has been cut away. If such irregular proceedings can only be wiped away by reduction, the litigation has only to be protracted beyond a twelvemonth, until another irregular election shall have taken place, which must also be the subject of a reduction, and thus I do not see when the question is ever to come to a conclusion. Therefore, if we are satisfied that it is a sufficient objection to this election that the election of 1851 is bad, and has been reduced, there is nothing wanting in regard to it but the formal challenge, and for what purposes may this challenge be necessary? To the effect of managing the affairs of the burgh, I do not see there can be any better challenge than the petition: and, therefore, we are driven to this, either to appoint managers when we are told there are intruders in the affairs of the burgh, or we are to allow these intruders to remain. The only question we have to deal with, comes to this, Whom are we to appoint?

LORD FULLERTON. I am of the same opinion. It is impossible to maintain on any intelligible ground that the challenge must be within two months. And what would be the use of bringing a reduction? It would just rest on the judgment in the former case, which is quite clear and explicit; and it would just come to a re-statement of that judgment, and so it would become impossible to bring the litigation to an end, by dragging it out beyond the year. A reduction is not necessary for any legitimate interest these parties may have, and, therefore, I am inclined to grant the application for the appointment of managers.

LORD CUNINGHAME. I agree. I am unable to find any legal ground for holding a reduction necessary. There cannot be a more fit case than the present for the application of the salutary rule every day enforced, *pendente lite nihil innovandum*. We are entitled and bound to disregard altogether a proceeding so palpably illegal on its very face, as the election of 1852, *pendente lite*.

LORD IVORY. I am of the same opinion. Here we have to deal with usurpers and intruders. A reduction would be of no use when we know that by our own judgment there are neither magistrates nor councillors at this moment. It is our duty to shew that the law must be enforced.

The COURT "remit to the Sheriff of Fifeshire to suggest three managers, reserving the question of expenses."

Jardine, Stodart, and Fraser, W.S., Petitioners' Agents.

T. and R. Landale, S.S.C., Respondents' Agents.

(J. S. M.)

No. 154.

PETITION, JOHN MAYNE AND OTHERS.

Curator bonis—Minor.—The Court will not appoint a *curator bonis* to a minor on any principle of expediency, but only on some specialty and necessity being shewn.

1st Division.

Mar. 11. 1853. *Petition, Mayne, &c.* This was an application for the appointment of a factor *loco tutoris* to James H. Mayne, a pupil, and of a *curator bonis* to Philadelphia M. E. Mayne, upwards of sixteen years of age, children of the deceased William Mayne, writer in Glasgow. The petition set forth that the children "have no re-

lations in this country, who take any interest in their concerns. The near-^{Mar. 11. 1853.}
 est relations are the petitioners," (brothers of the deceased William Mayne),
 "who are resident in England, and who, by reason of their distant residence, ^{Petition,}
 feel themselves unable to undertake the duties of curator or tutor. ^{Mayne, &c.} The
 minor petitioner, Philadelphia M. E. Mayne, in consequence of there being
 no friends or relations in this country to take an interest in her affairs, has
 been unable to find any one willing to allow himself to be nominated to the
 office of curator. In these circumstances, she is under the necessity of ask-
 ing for the interposition of the Court," and the petition referred to the follow-
 ing cases in which the Court had appointed *curators bonis* to minors *puberes* ;
Young, 19th January 1818, F. C. ; *Watson*, 6th February 1827, F. C. ;
Wood, 31st May 1834, S. and D. ; *Johnston*, 15th June 1839, S. and D. ;
Reid, 10th July 1834, 14 F. C., p. 1058, note ; *Roberts*, 11th July 1839, 14
 F. C., p. 1059, note ; *Patton*, 25th November 1847, 10 D. B. M., p. 148 ;
M'Lellan, ditto ; *Towton*, 8th December 1847, 10 D. B. M., p. 225 ; *Fleming*,
 15th November 1850, 13 D. B. M., p. 951 ; *M'Kinnan*, 12th July 1851, 14
 D. B. M., p. 12.

Fraser, in support of the petition. The appointment of a *curator bonis* is
 entirely a question of expediency. A paid officer of Court is more likely to
 manage the affairs committed to his charge better than a person who merely
 gives gratuitous advice.

LORD IVORY. The Court have at no time adopted the general principle
 that it is better to have a factor than that minors should choose curators for
 themselves. On the contrary, the Court have proceeded in the appointment
 of curators, not on expediency but on necessity alone ; and the cases referred
 to, which I have carefully gone over, prove the very reverse of what they
 are cited to support. The appointments there proceeded on specialties and
 necessities being shewn. But it is not necessary to deal with the general
 principle put forward here. We may proceed in respect of the necessity
 shewn by the petitioner for our making the appointment.

The LORD PRESIDENT. I cannot recognise the general principle urged
 upon us. To do so would be to interfere with the legal rights of a minor ;
 for as a *curator bonis* acts without the consent of the minor, were we to ap-
 point one, we would be superseding the pupil in the management of the
 estate. The special circumstances set forth, I think, warrant us in making
 the appointment.

The rest of the Court concurred.

The COURT therefore "under the special circumstances of the present
 case, nominate and appoint John Mann, mentioned in the petition, to
 be factor *loco tutoris* to James Haig Mayne, and *curator bonis* to Philadelphia
 Monteith Erskine Mayne, both therein mentioned, with the usual powers ;
 the said John Mann always finding caution before extract ; and decern *ad*
interim."

Patrick Paul, S.S.C., Petitioners' Agent.

(J. S. M.)

M'COWAN v. WRIGHT.

No. 155.

Fraud—Deed granted to disappointment of prior Creditors—Reduction.—In order to re-

duce at common law a deed granted fraudulently to disappoint the rights of prior creditors, it is not necessary, as a general rule, to prove knowledge as collusion on the part of the grantee of the deed.

(See p. 120 of this volume.)

2d Division.

Mar. 11. 1853.

M'Cowan v.
Wright.

In this case, which was a reduction under the Act 1621, and at common law, at the instance of the trustee on the sequestrated estate of James Howie, of certain deeds granted by Howie in favour of his brother-in-law, the defender, the following issues were tried before a jury in January last.

(The sequestration of Howie at a certain date; the title of the pursuer as trustee; the dates of the deeds sought to be reduced; and the relationship of the defender to the bankrupt, being admitted :—)

“ 1. Whether the said deeds or writings, or any of them, were granted by the said James Howie, to and for behoof of the defender, his brother-in-law, a conjunct and confident person, without true, just, and necessary cause, and to the hurt and prejudice of prior creditors of the said James Howie ? ”

“ 2. Whether the said deeds and others, or any of them, were granted by the said James Howie in favour of the said defender, fraudulently, to disappoint the legal right of the said creditors ? ”

The Lord Justice-Clerk, who presided at the trial, charged the jury to the effect, “ that fraud on the part of Wright, or collusion between him and Howie, was not necessary to be proved to entitle the pursuer to a verdict under the second issue.”

To this the defender excepted.

The jury found, “ under the 2d issue, that the deeds and other writings libelled on, being No . of process, &c., were granted by James Howie, in favour of the defender, fraudulently, to disappoint the legal rights of his prior creditors; and in respect of this finding, under the direction of the Court, they find it unnecessary to return any verdict under the first issue.”

In the debate, the discussion of the bill of exceptions was united with that of a motion by the defender, for a rule to show cause why the verdict should not be set aside, as contrary to evidence.

Penney, with whom *P. Fraser*, for the defender, contended, that to entitle the pursuer to a verdict under the second issue, which was intended to apply to the case as pleaded at common law, he must prove that the defender, the grantee of the deeds in question, was cognisant of the fraudulent intentions of the granter. That this must be held to be involved in the word “ fraudulently ” in the issue put to the jury, and had not been proved in point of fact, and that the direction of the Judge on that point was erroneous in law.

Brown, and the *Dean of Faculty*, (*Inglis*), for the pursuer.

THE LORD JUSTICE-CLERK. It has now been urged, in contradiction to the view taken by the same party when the issues were under discussion, that under these issues, and particularly under the second of them, it is essentially necessary to make out fraud on the part of the receiver of the securities, before the deeds could be fraudulent on the part of Howie, or have the effect of disappointing the rights of other creditors. The views taken by the defender at these different stages of the discussion, have thus been directly at variance. The view of the law given at the trial was exactly what the

Court stated when the issue was settled. The law laid down is, "That fraud on the part of Wright, or collusion between him and Howie, was not necessary to be proved to entitle the pursuer to a verdict." In considering the exception to this, two questions occur on the second issue; 1st, whether the terms of the issue are conclusive as to the law which the Judge was bound at the trial to lay down, and excluded the plea of the defender, that under that issue the fraud of the receiver of the securities was essential to the proof of the issue; 2d, What, if the term of the issue do not exclude that plea, is the true question to be tried under that issue, and whether collusion with the receiver, or fraud on his part, is in all cases necessary to be proved to entitle the pursuer to his verdict, founded on the common law. The defender's plea may be interpreted in two ways, either as involving a general principle, or as implying that this particular case is of such a nature that fraud on the part of the recipient of the deeds must be proved. The second point has been argued under the motion for a new trial, as being a question for the jury, assuming that we have decided the previous point against the defender.

Mar. 11. 1853.
M'Cowan v.
Wright.

I am bound to say, that I do think that the terms of the issue exclude, or are inconsistent with the defender's plea. The decisions relied on by the defender were quoted to us in settling a similar issue in the case of *Horne v. Hay*, 12th Feb. 1847, and the Court then rejected the plea, that it was necessary to prove fraud on the part of the receiver of the security.

What are the terms of the issue? "Whether the securities were granted by the said Howie in favour of the defender, fraudulently, &c." That is made a matter of fact. Did *Howie* do that? Under this question, can it be necessary to prove fraud on the part of any other than Howie? If the plea is, that concert is necessary, the two acting together for the same end, it ought to have formed part of the issue. The issue, however, applies only to the acts of Howie in granting the deeds, and the other inquiry cannot be made under it. But the defender says, that the Court could not intend to settle the question by means of the form of the issue, and that it is still open to him to contend that, in law, fraud is incomplete without fraud on the part of the receiver. I am willing, in case of any difference of opinion as to the terms of the issue, so to consider the matter. But we must attend to the way in which the defender arrives at that result. He says, the Court, by refusing to put into the issue, fraud on the part of Wright, only meant to lay the onus of proving that upon the pursuer. I cannot understand this view of the matter, for if it was necessary to be proved, it ought to have formed part of the issue. But assuming that the plea may competently be raised, let us see what is complained of under a reduction of such securities on the ground of fraud. It plainly is the act of the debtor which is injurious to the other creditors. His act creates the securities, and the fraud consists in this, that being insolvent, or in circumstances which must lead to hopeless insolvency, he creates the security to the effect of favouring one creditor, and to the prejudice of the rights of the others, by withdrawing all the funds which he can, or which are necessary for the preference, from distribution among the creditors generally. How then can it be necessary, in principle, in order to complete such a fraud, that collusion at the time, on the part of the recipient, must be proved? Is not the injury done, and the fraud complete, by the act of the debtor, in the

Mar. 11. 1853. circumstances, and to the effect stated? It will not make it any more a fraud that the recipient knew that it was so. If the creditor, when he might have got actual payment, refuses to do so, and takes a security instead, it may raise a question on the facts, whether the debtor was really in such circumstances as to make his act fraudulent. If the complicity here contended for is necessary, it can be so only on grounds which would make it necessary in every case. There may, no doubt, be cases in which the favoured creditor may be mixed up with the fraud of the debtor. He may have obtained the preference by availing himself of peculiar opportunities, or by using active measures to conuss the debtor. Still this is not an essential element, and the fraud consists in the voluntary act of the debtor himself. There can be no middle position for the defender between this, which denies that complicity is, in law, a necessary element, and that which places the absence of such complicity merely as a matter of observation on the proof, as tending to diminish the evidence of fraud on the part of the debtor, which is, of course, not a question of law at all. And although I hold that there is no such rule of law as that which is implied in the first alternative, the evidence of collusion on the part of the favoured creditor may be of vast significance in judging of the facts, and may be the means of disclosing the true nature of the case. The case of *Grant*, reported by Lord Kilkerran has been a leading authority in such cases for more than a century, and has always been held to fix, beyond controversy, the point, that the ground of reduction is the preference created by the debtor, whether the receiver of the deed is cognisant of the fraud or not. The ground of judgment is equally applicable to all deeds which are proper securities, whether they are challenged on the statute or at common law. So it was held in the case of *Bleason*, 7 W. and Shaw, p. 31, (see Lord Newton's Note). See also the case of the *Creditors of Stowe*, M.S. reports in Brown's Supplement. As to the case of *Horne v. Hay*, Mr Bell has no scruple in condemning it. The cases of *Broadfoot v. the Leith Bank*, 9th Dec. 1808; and *Ross v. Hutton*, 15th June 1830, have no application to the present.

LORD COCKBURN concurred.

LORD MURRAY, after narrating the facts which had been proved at the trial, and, on the assumption that collusion on the part of the defender had not been proved, said—The Court held before the trial that it was unnecessary for the pursuer to prove that Wright was cognisant of this fraud, for it was held in the case of *Grant*, a hundred and five years ago, that although the persons in whose favour the deeds are granted, which constitute a preference, are entirely ignorant of them, it is enough for the pursuer to prove that the granter intended to give an illegal preference to one or more creditors at the expense of others. That case has been reported by Lord Elchies, under the head of fraud, by Kames, by Kilkerran, and by Falconer, and all agree in reporting the circumstance, that the parties benefiting were entirely ignorant of the legal fraud. It is a leading decision, and has fixed the law of Scotland on this point.

His Lordship then made some observations tending to shew that collusion on the part of Wright had really been proved, which need not be reported.

LORD WOOD. There has been some discussion on the import and effect of ^{Mar. 11. 1853.} the second issue, on which alone the verdict has been returned. Looking to its terms, there appear to be only three things put in issue in express words: ^{M'Cowan v. Wright.} 1st, That the deeds were granted by Howie to the defender, of which there is no doubt; 2d, That it was done fraudulently; 3d, That it was done to disappoint the rights of prior creditors. Under the second head, it is not put whether the deeds were received or taken by Wright fraudulently. In adjusting the issue, the Court were of opinion that that was not necessary to be proved to entitle the pursuer to a verdict, and the presiding Judge at the trial was shut up to this as the law of the case, in his direction to the jury. It seems to me clearly contrary to principle to hold that a preference to a favoured creditor, to the disappointment of prior creditors, (assuming it to be beyond reach of the statutes 1621 or 1696), shall not be reducible at common law, however clearly the fraudulent purpose of the debtor may be proved, if only he has taken pains to keep the favoured creditor in ignorance of the proceeding until it be completed. As a general proposition, this is quite untenable, and the reverse was settled in the case of *Grant*, 9th Nov. 1748. No doubt, Mr Bell (Com. ii., 246), states that such deeds have been held ineffectual on the ground of collusion or consciousness on the part of the creditor, but it is clear from the whole passage, and from the deeds being designated as "*spontaneous*," that he means the constructive collusion, which is inferred from accepting and taking benefit of the deeds. It is true, also, that a different view was taken by the Court in *the Creditors of Stowe*, (August 1774, 5 Brown's Suppl. 383); but Mr Bell, in maturing that decision, observes, "that there does not seem to be a ground for such alteration of opinion," &c. Certainly, the deeds must be granted by the debtor *fraudulently*, and the collusion of the party benefited may afterwards be of the most material service in establishing that fact; but its relevancy to go to the jury for that purpose by no means implies the necessity of proving it as one of the elements of the case. There is, I am aware, one class of cases in which the want of fraud on the part of the creditor is a good defence to a reduction, such as payments in cash in the ordinary course of business, by which the debt of one creditor is extinguished to the prejudice of others. This rests upon special grounds; and I do not say that there may not be cases, even of this kind, in which cash payments may be sustained. Such was the case of *Broadfoot*, 9th Dec. 1808, F. C. That of *Ross v. Hutton*, 15th June 1830, goes a step farther. I demur to the doctrine, that a deed will be necessarily rendered unchallengeable by its being granted upon the demand of the creditor, or in consequence of a prior promise or undertaking to grant it. That fact may be used in order to assist in disproving the fraud, but will not, *per se*, exclude reduction. It is very different from the case of instant security being stipulated in the case of a loan. The latter was the case in *Horn v. Hay*, 12th Feb. 1847. I am, therefore, of opinion, that the direction to the jury that it was competent for them to find for the pursuer, under this issue, without his proving collusion on the part of the defender, was correct.

On the question of fact his Lordship concurred.

The COURT, therefore, 1. "Discharge the rule for a motion for a new trial,

Mar. 11. 1853. refuse the said motion," &c. 2. "Having considered the bill of exceptions, disallow the same."

M^cCowan v.
Wright.

T. Sprot, W.S., Pursuer's Agent.

A. Howden, W.S., Defender's Agent.

(W. H. T.)

No. 156.

GRAHAM v. LORD LYNEDOCH'S TRUSTEES.

Entail Amendment Act, 11 and 12 Vict. c. 36, § 43—Trust Settlement Clause, Construction of.—A truster directed his trustees, after payment of debts and legacies, to invest the residue of his funds in the purchase of lands, to be entailed on the same series of heirs as in a then existing entail. To this existing entail the truster specially referred, and directed his trustees to execute the new entail, under "all the conditions, provisions, and clauses, &c., in the said deed of entail contained, so far as the same may be applicable, so as to form a valid and effectual entail according to the law of Scotland." After the truster's death, and before the trustees had executed the purposes of the trust, the next heir reduced the existing entail under the Amendment Act. He then brought an action against the trustees to have it declared that they were bound to make an entail in terms of the previous defective one, and as, therefore, the entail to be so executed, would also be defective, that he must be held fee-simple proprietor of the lands directed to be purchased:—*Held*, that the intention of the truster was, that the entail to be executed by the trustees, should be a valid and effectual one according to the law of Scotland, and not a mere copy of the previous defective one.

1st Division.

Mar. 15. 1853.

Graham v.
Lord Lynedoch's Trustees.

This was an action of declarator at the instance of Robert Graham of Redgorton, against the acting trustees, under a trust-disposition and settlement executed by the late General Lord Lynedoch. By this trust-disposition and settlement, Lord Lynedoch conveyed to his trustees his whole heritable and moveable property. He directed his trustees, after payment of his debts and legacies, to invest the residue in the purchase of lands. His directions with regard to the land so to be purchased, as well as certain lands held by him in fee-simple, are contained in the fourth purpose of the trust, which is as follows:—*"Fourthly*, That after fully accomplishing the purposes aforesaid if any of my lands and heritages before disposed shall remain unsold my said trustees shall in due form of law dispose and convey the same to the heirs of entail called after me in and by a certain deed of entail executed by Thomas Græme sometime of Balgowan and John Græme his son dated on or about the 7th day of February and 9th day of June in the year 1726 and recorded in the Register of Entails on or about the 30th day of December in the same year under all the conditions provisions and clauses prohibitory irritant and resolute in the said deed of entail contained so far as the same may be applicable and so as to form a valid and effectual entail according to the law of Scotland and shall also lay out the remainder of my personal estate and effects if any be as soon as convenient purchases of land in the county of Perth shall offer in purchasing lands as aforesaid and when the lands are so purchased to dispose the same or take the dispositions and conveyances thereof to and in favour of the heirs of entail called after me in and by the aforesaid deed of entail executed by the said Thomas Græme and John Græme his son dated and recorded as aforesaid under all the conditions provisions and clauses prohibitory irritant and resolute in the said deed of entail contained so far as the same may be applicable and so as to form a valid and effectual entail according to the law of Scotland and upon such deed or deeds of entail being executed as well in regard to the

lands and heritages remaining unsold as to the lands and heritages to be purchased to cause the same to be recorded in the Register of Entails and the authority of the Court of Session to be interponed thereto." Mar. 15. 1853.

The debts and legacies having been paid, a considerable surplus remained, to which the direction to entail would apply. The pursuer, Mr Robert Graham, who was the heir of entail succeeding to the truster in the estates of Balgowan and Lynedoch, shortly after the death of Lord Lynedoch brought an action of declarator, to have it found that the entails of these estates were ineffectual to prevent selling, and that certain sales which had been previously made by him were legal and valid. A majority of the Court decided in his favour, and their judgment was affirmed in the House of Lords. Graham v. Lord Lynedoch's Trustees.

Mr Graham, following up these proceedings, brought the present action of declarator, in which, after setting forth the result of the previous process, the sales made by him of those entailed lands, and the trust-deed and settlement executed by Lord Lynedoch, he proceeds in substance to state, that, according to the fourth purpose of the trust, the trustees are bound, in the event of executing an entail, to adopt the precise terms of the entails of Balgowan and Lynedoch, without addition or alteration; or at least in no way to extend or strengthen the effect of the terms therein used in regard to the effectual imposition of the fetters of entail; and that consequently the entails so made by them would be defective entails—exposed to the same objection as the former. He then subsumes, that as by the recent Statute, 11th and 12th Vict. cap. 36., a tailzie which is not valid and effectual in regard to any of the prohibitions against alienation, contraction of debt, or alteration of the order of succession, is to be deemed invalid and ineffectual as to all, he, the pursuer, would have full power to alienate and dispose the lands, burden them with debt, or alter the order of succession gratuitously. That by the 43d section of the before-mentioned Act, money or other property invested in trust for the purpose of being entailed, is to be dealt with as the lands themselves would have been dealt with if entailed; and that the pursuer is consequently entitled to payment, simpliciter, of the whole trust-funds, and to a conveyance in fee-simple of the whole lands standing vested in the trustees.

The trustees lodged defences, and pleaded that according to the sound construction of the deed of instructions, which must be interpreted according to the presumed intention of Lord Lynedoch, the trustees are entitled and bound, in executing the entail directed by the truster, to make the same in such form as shall constitute a strict and valid entail according to the law of Scotland; and this being the case, the whole conclusions of the summons, which are based upon the assumption that the defenders are bound to make an ineffectual entail, must fall to the ground.

The Lord Ordinary (Wood) repelled the defences, and declared in terms of the libel.

Against this interlocutor the trustees reclaimed.

Neaves, Moir, and the Dean of Faculty, for the reclaimers. The question here arises under a deed of instructions to trustees, where the intention of the maker forms the rule of construction. *Stirling v. Stirling's Trustees*, 30th November 1838, 1 D. 130; *McAlister*, 29th June 1827, 5 S. 862; *Campbell's*

Mar. 15. 1858. *Trustees*, 14 S. 770; *Cumming*, 10th July 1832, 10 S. 804; *Sprot v. Sprot*, 22d May 1828, 6 S. 833; *Forrest's Trustees v. Forrest*, 14th Dec. 1845, 8 D. 304. The case results into this, whether there was some condition precedent to the carrying out of this purpose, viz., that the estate of Balgowan should remain an entailed estate, and with that intention unfulfilled, whether there was an intention to entail at all. There is not a case where a truster has used the word *entail* in which trustees have not been held to do their duty, unless they make a valid and complete entail according to the law of Scotland. The general idea in the mind of the truster was, that the two estates should go together, *i. e.*, that both estates should be settled on the same series of heirs, *Earl of Stair*, 12th Feb. 1823. The difficulty lies in the reference to the fetters of the Balgowan entail. The canon of construction regarding a matter of reference is this, that you must inquire for what purpose and with what object the reference is made, and you must not give effect to the reference beyond what is the object in view, and so, while this reference is made to the Balgowan entail for the conditions, &c. of the entail, the directions are, that the entail shall be made valid according to the law of Scotland. All difficulties are obviated by reading the reference to the clauses of the Balgowan entail not as a direction to *adopt*, but to *adapt* these clauses to the new entail. 1 Juridical Styles, 250. The prohibitions of an entail are the law of the entail; the irritant and resolutive clauses are merely the machinery to carry them into effect.

T. Mackenzie, Dundas, Deas, and Penney, for the respondent. If a truster directs his trustees to make a valid entail according to the law of Scotland, his intentions are quite palpable. He commits the matter to the discretion of his trustees, and his intentions being so expressed, are to be fulfilled by the trustees. But if a truster directs his trustees to insert special and particular clauses, either by so many words, or by reference to clauses in a deed, it may be that it was his intention to have a valid and effectual entail, but if that was the instruction in the trust-deed, and nothing more, his intention fails in effect. According to the true construction of the clause in question, the truster gave no discretion to his trustees whatever, and he did so having no doubt of the sufficiency of the Balgowan entail. The view of the other side goes to this, that there was an unlimited power given to the trustees to make a valid entail according to the law of Scotland.

T. Mackenzie, Dundas, Deas, and Penney, for the respondent. If a truster directs his trustees to make a valid entail according to the law of Scotland, his intentions are quite palpable. He commits the matter to the discretion of his trustees, and his intentions being so expressed, are to be fulfilled by the trustees. But if a truster directs his trustees to insert special and particular clauses, either by so many words, or by reference to clauses in a deed, it may be that it was his intention to have a valid and effectual entail, but if that was the instruction in the trust-deed, and nothing more, his intention fails in effect. According to the true construction of the clause in question, the truster gave no discretion to his trustees whatever, and he did so having no doubt of the sufficiency of the Balgowan entail. The view of the other side goes to this, that there was an unlimited power given to the trustees to make a valid entail according to the law of Scotland.

LORD PRESIDENT. This question has been argued with much anxiety and great ability, but lies in a narrow compass. It turns on the interpretation of a certain passage in the trust-deed of 1821. The trustees of Lord Lynedoch have not yet executed the deed which he had directed them to execute, settling the lands held by them, as directed by Lord Lynedoch. The question now arises, whether they are to settle these lands on the appointed heirs, so as to form a valid and effectual entail according to the law of Scotland, or to convey them to the pursuer in fee-simple, or, what is practically the same thing, to settle them in the precise terms of the deed 1726, with its fatal imperfection, which makes it no entail. That question depends on the interpretation to be put on the terms of the direction in the fourth purpose of the trust. I think that we must read this direction with any light which it can derive from those surrounding circumstances to which the trust-deed has reference, and there

which appear to be of any importance are—1. That Lord Lynedoch was pro-Mar. 15. 1853. prietor of the entailed estate of Balgowan; and that it was an object with him to preserve that estate in the line of succession pointed out by the deed of 1726. 2. That it was also an object with him that the estate to be settled by his trustees should also be preserved in the line of succession pointed out by the deed of 1726. 3. That he wished this to be effected by an entail. 4. That he was not aware of the flaw in the entail of 1726. 5. That it is now an ascertained fact that there is a flaw in that entail. Now, then, having reference to those circumstances as bearing, in some degree, on the interpretation to be put on the direction in the trust-deed, we are required to put the true interpretation upon it. The pursuer contends that it is an instruction to execute a deed in the same terms as the deed of 1726, and no otherwise; that the trustees have no power to correct any ascertained flaw in that deed; that if Lord Lynedoch was aware of the flaw, he must have intended it to be retained; that if he was not aware of it, but believed the entail of 1726 to be valid, then still more clearly was it his intention that the terms of that deed should be adhered to; that his great object was to keep the whole estates together, to make an addition to the estate of Balgowan, not a separate entailed estate; that if he had been aware of the flaw in the entail 1726, *quomodo constat*, that he would have directed any entail to be made; that *in dubio*, there is no presumption in favour of fetters. On the other hand, the trustees seeking to have their duties defined by the Court, and charged with the interests of the future heirs, have suggested to us, in a very able argument, that the substance of the direction is to dispoise the lands to the series of heirs there appointed, by reference to the deed of 1726, so as to form a valid and effectual entail according to the law of Scotland; that to dispoise the lands in fee-simple would not be a fulfilment of that instruction, but, on the contrary, a direct violation of it. The question is thus fairly raised by the proper parties, and in the proper form, and at the proper time. As to the case itself, it appears to me to belong to that class of cases which have been treated as instructions to trustees, and to be ruled by the intentions of the maker, not to that class which have been treated as operative deeds of conveyance to be ruled by the technical structure of the clauses. Still the intention must be deduced from the language of the deed; the words must be interpreted with reference to the place where they are employed, that is to say, in a legal instrument of this kind, and with reference to the occasion on which they are employed. The first thing that strikes one on the reading of the direction, is, that it does in so many words direct the trustees to dispoise and convey the lands in due form of law, so as to form a valid and effectual entail according to the law of Scotland. Then again, it is not disputed that Lord Lynedoch intended and believed that the lands were to be held under a valid and effectual entail according to the law of Scotland. Still, if in his instructions he has so restricted his trustees, so tied them up to the precise terms of the deed 1726, that it is impossible for them to make a valid and effectual entail, that is sufficient for the solution of the present question. His intention that there should be a valid and effectual entail will then be defeated, because he has desired his trustees to make that valid and effectual entail in terms which will not be a valid and effectual entail; that is, because he has given an instruction self-contradictory and inconsistent, and

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therefore impossible to be fulfilled. That is an interpretation and conclusion to be avoided if there is any other fair and reasonable interpretation. No doubt the contradiction, if it does exist, is to be ascribed to his ignorance of the technical flaw in the entail of 1726. Still we must not court contradictions in the instructions. But it does not appear to me that there is really or substantially a contradiction. The direction to entail is not made to depend upon, or to be deduced or inferred from the reference to the clauses of the deed 1726. It is separately and substantially given in plain, broad, unambiguous terms,—in words which were valuable for that purpose, but quite unnecessary for any other purpose. There is a reference to the deed of 1726 for certain purposes: 1st, for the series of heirs—that is the leading purpose of the reference; 2d, to direct that *all* the conditions, &c., of the deed 1726, should be introduced, but with two qualifications,—*first*, so far as they may be applicable, and, *second*, so as to form a valid and effectual entail according to the law of Scotland. This last was the substance of the direction. It is said that Lord Lynedoch considered the Balgowan entail to be the best possible model, and, therefore, wished it to be followed. If he only wished it to be followed because he believed it to be the best model, then I think it plain that his intentions would not be violated by abstaining from implicitly adopting it when it has turned out on trial to be bad. If he merely meant to express an opinion on conveyancing, that is not of the substance of the direction. He wished that all the conditions and clauses of the Balgowan entail should be introduced, so that, while the Balgowan estate remained under the entail of 1726, the lands to be entailed by his trustees might not be carried to a different series of heirs, or cease to be under the fetters because of the omission of any of the conditions contained in the Balgowan entail. But that he had any other view than that the lands which his trustees were to entail should be effectually secured to the heirs in the destination of 1726, I cannot discover.

LORD FULLERTON. The question, though of some importance to the law, from the principles involved in it, lies within the narrowest possible compass, being the true construction of the clause directing the trustees to execute an entail of the lands conveyed to them, or purchased by the funds placed in their hands by the truster. Now, taking the simple view of the case, which reduces the question to one of the comparative, overruling, and imperative force of the last parts of the clause, it appears to me, that on every principle of law and sound logic, the latter part of the clause must be held to be the imperative expression of the will of the truster. No doubt he directed the trustees to insert in the new entail all the provisions and restrictions of the original entail, evidently on the supposition that he considered those provisions and restrictions to be sufficient. But he was not satisfied with that; he directed that those provisions and restrictions should be inserted so as to form a valid and effectual entail according to the law of Scotland. Now, can there be a doubt, that in the mind of the truster the latter direction was the most absolute? And though no doubt the truster contemplated the unity of the estate, and the identity of the fetters, for the good reason that he considered those fetters to be sufficient, the motive which he did express was one of a different kind, and certainly as reasonable, viz., that the rights and interests of the parties called to the succession should be protected by the fetters of a strict entail.

I cannot help thinking that the conclusions of the present summons, taken Mar. 15. 1853. alongst with the narrative on which it is founded, is little better than a contradiction in terms. In truth, the delay—the period which has intervened—between the date of the trust-disposition and the date of the deed to be executed by the trustees, of itself has made an essential difference on the situation and powers of the trustees. By the passing of the Act 11th and 12th of Victoria, it is no longer in the power of the trustees to make as good an entail by following literally the form of that in the original entail, as they could have done at the date of the trust-deed. The 11th and 12th Victoria has intervened, and has absolutely annulled an entail which previously was only partially invalid. I think the pursuer has demonstrated by his former action, and the reference to the Act 11 and 12 Victoria, that there are no means of reconciling the fetters of the old entail as they stand, with a “valid and effectual entail according to the law of Scotland;” those obsolete and ineffective fetters can no longer form the limits of the powers of the trustees. In truth, the judgment obtained by the pursuer in the former action seems to me to remove all doubt as to the duties of the trustees. While the fetters of the original entail stood unchallenged, it might have been a question whether they, on their own opinion (evidently contrary to that of the truster) that the former entail was bad, were entitled to insert different fetters in the deed they were called on to execute. But now, when the pursuer himself has proved that the trustees were wrong in that opinion, it does seem an extraordinary proposition that the trustees are bound to construe the words, “so as to form a valid and effectual entail according to the law of Scotland,” according to the erroneous opinion of the truster, and not according to the authoritative exposition of the law itself, as obtained by the pursuer in his former action.

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On these grounds I think that the interlocutor of the Lord Ordinary must be altered, and the defender assoilzied from the conclusions of the action.

LORD CUNINGHAME. I should have concurred in the views of your Lordship, if I had considered that the trust-deed on which the question turns, contained an imperative direction on the trustees to execute a new and strict entail of the lands to be purchased by the trust-funds, not only in terms of a prior entail specially referred to, but also authorising every alteration and additional provision necessary to obviate objections which have emerged in the law of entail since the date of the trust. Such a deed possibly might be framed; but it would not be easy to make a new entail “under *all* the conditions” of an old one, and framed with such altered provisions as late authorities required. I have never known any example of such a deed, and cannot interpret the present as one of that description. And here we must call to mind certain classes of analogous cases which afford important materials for the decision of the present. While we have different cases, in which heirs of entail have left large personal funds invested in trust, to be added to an anciently entailed estate, we have other cases where individuals, architects of their own fortune, have left a great treasure to trustees to found a family for the first time, and to be settled in strict entail on a definite series of heirs expected to endure for ever. In the latter class of cases (to which belong *Cumming*, 10th July 1832; *Campbell*, 12th May 1838; and *Stirling*, 30th

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November 1838;) the Court held trustees entitled and bound to execute a strict entail, with every clause required in the latest and best practice to save the estates from sales, debt, and alteration of the order of succession. The present case obviously does not fall within that class, as the trust properties here held were not to be enjoyed *per se*, but to be joined with a much larger estate, and to be settled conform to a long previously existing settlement. In cases of that class, it appears to me to be generally presumable that the trusters mean the newly entailed estates to stand on titles as nearly identical in clauses, style, and provisions with the original entail as may be practicable and applicable in a new deed transmitting new subjects. On the best consideration that I can give the present case, it falls within the last category; and there is no valid or feasible consideration for placing it in any other. At the date of the original trust, Lord Lynedoch evidently had no more doubt of the validity of the entail of 1726, than of his own existence. Neither had his agents. Their object was to add newly acquired lands to the old entail. What then was the natural course for them to pursue? The fourth direction of the trust is simple and clear, whereby the trustees were directed to execute, at the period specified, a new or supplementary entail, "under ALL the conditions, provisions, and clauses, prohibitory, irritant, and resolute, in the said deed of entail contained, so far as the same may be applicable," &c. I am aware the clause does not stop here; but it is amplified by the few exegetical words, to the effect, "so as to form a *valid and effectual entail*, according to the law of Scotland." Surely, however, this did not imply that the trustees were to *change and alter* any clauses of the deed of 1726, already deemed perfect. It was no more than a declaration of the confidence which the granter or framer of the trust-deed had in the unassailable efficacy of the entail of 1726. It is nothing else, and might have been expressed with equal clearness in other terms, as by his adding, "whereby, by adopting the deed of 1726, the trust-lands will be settled in a valid and effectual entail, according to the law of Scotland." It is argued as if these words implied a power given to the trustees to execute an entail that should be valid and effectual according to the law *as latest expounded*, though *different* in the most essential point from the entail of 1726. It is not easy to find either grounds or legal expressions to import that extraordinary interpretation. The defenders, however, attempted to meet that objection, by alleging that they could obviate it, by framing a deed under all the conditions, provisions, and clauses of the deed of 1726, and thereafter insert another *irritant* clause, remedying the inaccurate phraseology of the entail of 1726. It is rather thought that thus the chief plea against the interlocutor rests on a fallacy, and is altogether untenable and inadmissible, on the following grounds:—

In the first place, an entail in the terms and of the structure proposed, if it contained the irritant clause *both* in its *original* terms, and in a *different and corrected form*, would be plainly an incoherent and contradictory deed. The proposition seems to proceed on the notion that the new entail might contain a *copy* of the clauses of the entail of 1726, and subsequently insert another and a corrected irritant clause in the same title. But that would not be competent. The direction of the trust-deed was to grant the new entail *under all the conditions and clauses* of the entail of 1726. These burdens must be in-

serted *bona fide* as conditions of the grant, and not merely copied as an admission of the terms of the conveyance of 1726. But if a deed is granted under the conditions of a certain prior title, and if *different* conditions be added and inserted in a subsequent part of the same deed to contradict it, it would nullify itself. There is no example of a deed so framed having been ever admitted in practice.

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2. It has been shewn on grounds which need not be repeated, that neither the truster, nor the conveyancers who acted for him at the date of the trust, had any idea that any alteration was necessary in the entail of 1726, to strengthen its validity. His intention manifestly was that the trustees should not go beyond that model.

3. Were the defenders' plea sustained relative to the trust-funds now at issue, it would, under the altered circumstances of the previous titles of 1726, lead to a result not only not anticipated by the truster, but manifestly contrary to his views and intention, as far as these can be traced or inferred. The lands contained in the entail of 1726 exceeded in value the trust properties to an amount which renders comparison unnecessary. Now, a truster might desire to add to the principal estate when that was certain to be preserved; but when the principal entail was annihilated, it is to the last degree improbable that the gallant Peer would have wished such a fragment of his property as the trust lands, to be settled as the inheritance of his family. On all these grounds, I am constrained to differ from your Lordships.

LORD IVORY. I concur in the opinions of the majority, and I do not know, after the distinct judgments that have been delivered, that it is necessary for me to add more. If it had been directed in so many words, that this deed of entail should be taken, not as a model, but as that which was to be implicitly adopted in all its clauses, there could have been no doubt. But the clause is so expressed as to involve us in a conflict of meaning. If you stop at a certain point, it is clear that you must follow the original entail. If you go farther, it is clear that you are to make an entail according to the law of Scotland. In this situation it is necessary to ask, what is the predominant object of the entail? The substantial object of the testator, as it appears to me, is, that his trustees shall entail this subject upon the heirs that he names. Now, in a question of construction, if there be a collision between the object in view and the machinery by which it is to be carried through, that machinery is subordinate, and it is with it you are to take freedom. But as I read this deed there is no contradiction at all. The direction is not to insert the clauses of the original entail absolutely. It is only so far as they are applicable, and necessary to make a strict entail. You are not to insert a new condition into the entail, nor to make new prohibitions, because that is within the intent of the deed. But when you are dealing with the fencing clauses, you are dealing with that which the trustee had no otherwise in view than as a means of following out and securing the object of the deed. I am quite satisfied, that in dealing with the question of intention, you are to deal with the prohibitions as within the intent of the trust, but when you are asked how these are to be fenced so as to make a strict entail by the law of Scotland, you have got away from the object, and are dealing with the machinery by which that object is to be carried into effect. Now, I think

Mar. 15 1853. that the clause in the trust-deed is qualified by the words "so as to make the entail valid according to the law of Scotland." You must deal with the mode so as to make the object effectual; and the conclusion I have arrived at is in accordance with the views expressed by your Lordships.

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The COURT, "alter the interlocutor of the Lord Ordinary reclaimed against, sustain the defence, and assolvie the defenders from the conclusions of the libel: Find no expenses due," &c.

Dundas & Wilson, W.S., Pursuer's Agents.

Murray & Ferrier, W.S., Defenders' Agents.

(J. S. M.)

No. 157.

BRYCE OR COLTART v. DUNBAR OR CORIE, &c.

Faculty, Exercise of—Consideration.—Held, that a disposition, on the narrative that the granter had received much kindness and attention from the grantees, and was "anxious to testify his gratitude for their past services, and to secure a continuance of their care and attention in time to come, and to provide for their comfort and maintenance after his death," was not a legal exercise of a power conferred on a liferenter of disposing of the subject "if necessary for his support."

1st Division.

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Bryce v.
Dunbar, &c.

In 1818, Margaret Skinner, with the advice and consent of Samuel Roderick, her husband, and the said Samuel Roderick, for his right and title, executed a disposition and settlement of a small heritable subject, which had been purchased with the wife's money, and in which the husband had a mere liferent, in favour of trustees, appointing them to convey it, on the death of the survivor, to their adopted son, William Roderick. The deed then proceeded thus,—*"reserving to ourselves . . . or either of us surviving, at any time during our lifetime, should we or either of us surviving as aforesaid find it necessary for our support, to sell and dispose of the said subjects in the same manner as if the preceding disposition thereof had never been executed: And in respect the said Samuel Roderick has only right to the said subjects for his liferent use allenarly, I, the said Margaret Skinner, to the effect he may sell and dispone thereof, should he find it necessary as above written, in the event of his surviving me, do hereby assign, dispone, and convey to him and his assignees,"* the said property. There was an obligation to infest the trustees, "and in the event above written, also to infest and seise the said Samuel Roderick, and his assignees, *with and under the obligation and condition above expressed:*" And the procuratory of resignation and precept of sasine were couched in favour both of the trustees, and "in the event foresaid," of Samuel Roderick. The deed further dispensed with delivery, and reserved "power to us, or to the survivor of us . . . to alter, innovate, or revoke these presents, in whole or in part." Mrs Roderick died soon after the execution of this deed; and William Skinner, the beneficiary, as well as all the trustees, predeceased Samuel Roderick. In 1836 Roderick conveyed the subject to the defenders, Margaret Dunbar, and Margaret Corie, upon the narrative that he had received much kindness and attention from them, and "that he is anxious to testify his gratitude for their past services, as well as to secure a continuance of their care and attention to him in time to come, and to provide for their comfort and maintenance after his death." This deed reserved to the granter at any time during his lifetime, should he find it necessary for his support, to sell and dispose of the said subject, as if the disposition had never been granted. He thereafter took infestment upon the deed

of 1818, and died in 1848. The present action was raised by the pursuer, ^{Mar. 16. 1853;} as Mrs Roderick's heir in general, for the purpose of reducing the deeds above narrated; but latterly she only insisted for reduction of the disposition of ^{Bryce v. Dunbar, &c.} 1836, upon the ground (set forth in the third reason of reduction), that it was *ultra vires* of Samuel Roderick, who had only power to sell the subject, should he find it "*necessary for his support.*"

The Lord Ordinary, (Ivory), sustained the third reason for reduction, but found no expenses due.

In a note his Lordship observed,—“The deed under challenge does not come up to the *necessity*. For instead of setting forth the disposal thereby made, as a thing necessary for his support, it, *per expressum*, reserves, notwithstanding the disposal so made, the very same power, ‘at any time during my lifetime, *should I find it necessary for my support*, to sell and dispose, &c., as if the present disposition had not been granted.” “As to the general power of revocation contained in the mutual settlement, it could only extend to matters previously within the power of the respective parties, in so far as these might otherwise stand affected by the deed. But this could never entitle Roderick to alter the deed with reference to a subject *which never was to him at all*, excepting under the deed itself, and with reference to a limited power thereby *in terminis*, of the first time conferred.”

The defenders reclaimed.

Seton, and *Gordon* for the reclaimers argued, that the deed of 1836 was a fair and proper exercise of the reserved power of sale, which must be liberally dealt with. The consideration is onerous; *Adamson v. Inglis*, 16th Nov. 1832. But further, the conveyance in the deed of 1818 to Roderick was absolute in the event of his wife's predecease, and that deed is not challenged here. Being thus constituted fiar, he could validly grant onerous deeds. Further, even assuming the deed of 1836 to be gratuitous, it was an implied alteration of that of 1818, competent under the reservation of power to alter.

James Lorimer, and *Pattison*, for the pursuer, maintained that the conveyance to Roderick was a limited and qualified one, vesting no right of fee, except to sell “for his support.” The whole tenor of the deed of 1836 shews the transaction was not necessary for his support.

LORD PRESIDENT. The first question is, whether the deed of 1836 was granted in the exercise of the power of sale conferred upon Samuel Roderick by the deed of 1818, irrespective of the conveyance made to him in that deed, such as it was. It appears to me that it was not a legal exercise of that power. His right to sell was limited to the case of its being found necessary for his support. Does the deed of 1836 appear *ex facie* to have been granted in exercise of a power of sale for the purpose of support? I do not find it say this. Could “kindness and attention” mean support, the question might then arise, whether by granting this deed, he had not taken an obligation for his support. But the latter part of the inductive clause, “and to provide for their comfort and maintenance after his death,” clearly shews that the former part is not equivalent to a statement that they had supported him; nor is it averred in the record that they had. Then comes the second point, whether the conveyance to Roderick in the deed of 1818 is such as vested in him the

Mar. 16. 1853. power of selling absolutely. I cannot take this view. He obtained no absolute right enabling him to dispose either onerously or gratuitously, but only when *necessary for his support*. If the argument on the reserved power to alter were good, such an alteration would be to greater effect than an absolute revocation. It would be an alteration of his original liferent into a fee, which was certainly not within the scope of that clause.

Bryce n.
Dunbar, &c.

LORD FULLERTON concurred.

LORD CUNINGHAME had formed a different view, but stated that, as he stood alone, he yielded to the opinions of the other Judges.

LORD IVORY remained of the opinion he had expressed as Ordinary in the case.

The COURT accordingly, "adhere to the interlocutor of the Lord Ordinary, under this qualification, that it is to be taken as applying only to the disposition of 2d August 1836, to which alone the third reason of reduction has reference."

Ferguson and Stuart, W.S., Agents for Pursuer.

Bridges and Macqueen, W.S., Agents for Defenders. (J. S. M.)

No. 158.

M'CULLOCH v. THE SOUTHERN BANK OF SCOTLAND.

Submission—Arbitration.—A party having agreed to refer his claims against a joint stock company to the decision of "the present directors," and a meeting of the shareholders having afterwards, without his consent, appointed two parties to act as paid advisers of the referees:—*Held*, that this was such an unwarrantable interference with the integrity of the reference as invalidated an award pronounced with the aid of these advisers, and disqualified the referees from considering the matter by themselves under a re-remit.

1st Division.

Mar. 16. 1853.

M'Culloch v.
Southern Bank
of Scotland.

The Southern Bank having brought its business to a close, a general meeting of shareholders was held on 3d January 1843 to name a person to wind up its affairs in terms of the contract of copartnery. It was moved that M'Culloch, the pursuer, should be appointed to this office. The minutes of meeting, which were signed by him "in token of his acceptance of the office," bear, that "being specially asked what remuneration he would expect for his trouble, he said that that must entirely depend upon the amount of labour involved in the business, but that he would leave it to be settled by *the present directors*. The motion having been put with this explanation, was unanimously agreed to." M'Culloch was then directed "to find security for his intromissions, to the extent of L.1000, to the satisfaction of the present directors, who are hereby appointed a committee, with whom he may advise on the state of his accounts in his progress in winding up the affairs, and by whose advice he will be guided in the whole business." The directors, at this time, consisted of seven individuals. M'Culloch presented his final report to the shareholders in 1847, in which, after crediting himself with nearly L.5000 as commission, he brought out a balance in his favour of L.3553, 6s. 2d. This report was taken into consideration at a general meeting of shareholders, on 16th July 1847, when, as stated in the minutes, "the meeting found that a distinct understanding and agreement were come to between Mr M'Culloch and the shareholders, that the amount of his remuneration in winding up the bank's affairs should be left to the decision of Messrs Bell, Rankine, Thomson, Thorburn, Watts, M'Fee, and Kemp, directors at the

time. The meeting made inquiry of Mr M'Culloch, whether he was disposed to implement that agreement, by submitting the amount of the charge made by him for commission, and the other legal expenses incurred by him, to the said directors. Mr M'Culloch stated that he *now* declined to do so. It having been put to the meeting whether the remuneration to Mr M'Culloch should be fixed as arranged by said minute, the meeting unanimously resolved that it shall be remitted to the committee to proceed to fix Mr M'Culloch's remuneration, in terms of the agreement.

Mar. 16. 1858.
M'Culloch v.
Southern Bank
of Scotland.

"The meeting, having ascertained that the report and state of accounts now produced by Mr M'Culloch had not been previously submitted to or approved of by the committee appointed for the purpose of advising and directing him, request the committee now to proceed to take that report and state of accounts into their consideration, and, after having investigated the same, to report thereon to a general meeting of the shareholders.

"The meeting appoint Mr M'William of Stranraer, Mr Thorburn, Dumfries, to assist the said committee at all times when required, it being understood that they and Mr Kemp should be remunerated for their trouble. The meeting appoint Mr Kemp to be convener of the said committee."

The reason of M'Culloch's declinature appears to have been, that two of the directors, in whom he placed great confidence, had seceded from the committee, and refused to act. The remaining five, however, proceeded under the remit to take the pursuer's claim of remuneration into consideration. The result is thus stated in their report of 31st July 1847:—"The meeting having carefully considered the claim made by Mr M'Culloch for commission, and having advised with Messrs M'William and Thorburn, are of opinion that a commission of five per cent. on the amount of Mr M'Culloch's account of charge is altogether extravagant, and out of the question." "The committee are of opinion that the sum of L.1000 is a liberal remuneration to Mr M'Culloch, and fix his remuneration accordingly at that sum."

The pursuer, refusing to submit to this decision, raised the present action, concluding for the above sum of L.3553 : 6 : 2, as the balance due him on his intromissions. The defenders waived any objection competent on the ground of no reduction having been brought of the resolution of the committee, and pleaded, that the commission had been finally and definitively settled at L.1000 by that resolution, which was binding on the pursuer.

The Lord Ordinary (Wood) "Repels the first defence founded on the resolution of the committee; finds that the remuneration due to the pursuer for his services has not been thereby definitively fixed; finds that the said remuneration still remains to be ascertained, and sustains the pursuer's objection to that matter being now remitted to the said committee for consideration and settlement by them, and decerns; and before farther answer, and particularly before answer in regard to the mode to be resorted to for fixing the amount of said remuneration, appoints the cause to be enrolled, and reserves all questions of expenses."

His Lordship observed in a note,—“By the course taken, the consulted parties were substantially made, more or less, the judges of the remuneration to be fixed, although the resolution may bear to express the opinion of the committee. Assuming the special report to be in form the opinion of the com-

Mar. 16. 1853. *mittee*, it is their opinion as advised by the parties consulted and advised *with*; and it may be an opinion (and that is enough for the pursuer) which, in reality, is truly the opinion of their advisers, as being that to which the committee were brought by the advice they got, and which, if they had acted alone, they would never have entertained."

M'Culloch v.
Southern Bank
of Scotland.

The defenders reclaimed; for whom—

G. Young argued, that the decision of referees cannot be vitiated by the mere fact that they have consulted with third parties. This is a course adopted by all arbiters, though not set forth *ex facie* of their awards; but this can make no difference if the taking advice be a good ground for reducing a decree.

E. F. Mailland, for the pursuer, pleaded, that a new tribunal had been created, to which M'Culloch had never consented to refer his claims; its decision could not, therefore, bind him.

The LORD PRESIDENT. I take the Lord Ordinary's view. The question, whether M'Culloch's declinature was justifiable or not, in consequence of the withdrawal of two of the directors, comes to be of no importance as the case turned out. The meeting of 16th July 1847 appears to me to have dealt with two matters:—*first*, they remitted to the seven directors to fix M'Culloch's remuneration, in terms of the agreement; and, *secondly*, they requested these directors, as the committee of advice appointed at the meeting of 3d January 1843, to investigate his report and state of accounts. It is in reference only to this second matter that I am disposed to think that Messrs M'William and Thorburn were appointed as hired assistants. I do not think that it was in the contemplation of the meeting that their advice was to be taken in the matter of the remuneration. But the committee failed to make this distinction between their own proper functions and their functions in conjunction with M'William and Thorburn; but, as their report states, advised with these gentlemen as to the fixing of M'Culloch's commission. It was only after taking this advice that they came to the opinion that it was extravagant. This certainly was not the spirit at all of the original reference. M'William and Thorburn may just have been the very persons whom M'Culloch might not have desired as referees; and we cannot assume that the opinion of the directors was the same as if they had not been present. There was an unwarranted interference with the integrity of the reference, of which M'Culloch has good reason to complain. It follows as a corollary, that as the remuneration due to the pursuer cannot now be ascertained by a re-remit to the committee, as still the proper parties to determine its amount, for their opinions having been influenced by the foreign advice, must now be looked upon as poisoned; and, besides, as directors, they have defended this action by the authority of the shareholders. Some other mode must, therefore, be resorted to.

LORD FULLERTON was of the same opinion.

LORD IVORY. I concur. I think M'Culloch had a material interest to say, "I am not bound to refer my remuneration to only five out of the seven directors." But whether he was right or wrong in his declinature, the question here is, can he repudiate the award on the ground of the addition of two

paid assistants to the number of the original referees, and of the nomination of a paid convener? The committee proceed expressly upon the advice of these persons. This is not at all a position in which referees can be placed. It is one thing that they should be allowed for their own information to take incidental and collateral advice when they are left free to act for themselves, but it is quite another thing to get paid advisers forced upon them.

LORD CUNINGHAME absent.

The COURT "refuse the prayer of the reclaiming note, and adhere to the interlocutor of the Lord Ordinary: and remit the case back to his Lordship, to proceed therein as shall be just: and reserve in the meantime all questions as to expenses."

G. & G. Dunlop, W.S., Pursuer's Agents.
John Keegan, S.S.C., Defenders' Agent.

(J. S. M.)

HUTCHISON'S TRUSTEES v. HUTCHISON AND OTHERS.

No. 159.

Fee or Liferent—Clause—Construction—Trust Settlement.—A father having, *mortis causa*, conveyed his funds to trustees, "to set apart and secure to each of my daughters in life-rent, and their children respectively in fee," £1500; and having declared that advances made to them during his life should be deducted from their provisions:—*Held*, 1st, That two several and distinct estates were thereby created, that belonging to the daughters being a mere life-rent: 2d, That an advance made to a daughter could not affect the fee of the £1500, which belonged to her children: And, 3d, That there were no terms in the deed sufficiently strong to shew that he intended the fee to be affected therewith.

The present question was raised in an action of multiplepinding, &c., 1st Division, brought by the trustees of the late John Hutchison, with the view of settling the rights of parties under his settlement, dated 16th December 1840. By this deed, he conveyed his whole estates, heritable and moveable, to the pursuers in trust, for the following purposes, viz., 1. Payment of his debts, &c.: 2. "That they shall secure to Mrs Elizabeth Morison, my spouse, in life-rent for her life-rent use only, the dwelling-house of Cairngall, . . . and shall also deliver to her, as her own absolute property, the whole household furniture, &c., and shall make regular payment to her of a free life-rent annuity of £150 sterling, at two terms in each year," &c.: 3. "That they shall set apart and secure to each of my daughters, Mary, Elizabeth, Katharine, Anne, and Jean, in life-rent, and their children respectively in fee, the sum of £1500 sterling, to bear interest from the first Whitsunday or Martinmas six months after my decease, but always with and under this special condition, viz., that as these provisions are intended for the personal benefit of my daughters and their children, so the same are to be noways subject to the *jus mariti* of their husbands, or to the debts or deeds of any or either of them, or the diligence of their creditors; and the receipts of my daughters themselves, and of their children, according to their several rights of life-rent and fee, shall be sufficient exoneration to my trustees, without the necessity of any consent or acquittance by their several husbands; and lastly, That they shall pay and divide the free remainder and residue of my estate, hereby disposed amongst my sons, Robert, James, Alexander, William, George and John, equally between them, share and share alike; it being understood and hereby specially provided and declared, that whatever sum or sums have already been paid,

Mar. 19. 1853. or may in my lifetime hereafter be paid to any or either of my said children, whether sons or daughters, and vouched by receipt or other written document, or entered to their debit in my ledger or other account book, shall be held and accounted (without reckoning interest thereon,) as so much of the provision falling to such child or children under this deed of settlement." The truster's daughter Mary had married Mr Arbuthnot, and died in 1837, before the execution of her father's settlement. In 1823, she had received from her father £1000, "to account of patrimony."

Hutchison's
Trustees v.
Hutchison, &c.

In the multiplepointing, claims were made for the Arbuthnots, Mary's children, and for the residuary legatees; the former claiming to be ranked for the whole legacy of £1500, to be divided among them *pro rata*, and pleading that this sum had vested in them on the truster's death, and that no act or deed of their mother, as the liferentrix merely, could affect or discharge the fee in whole or in part; while the residuary legatees maintained that the £1000 advanced to Mary was intended to be deducted from the provision of £1500, to her and her children, and that the latter were only entitled to £500.

The Lord Ordinary (Ivory), "Finds that, according to the sound construction of the deed, the fee of the £1500 provision thereby settled by the testator upon the children of his daughter Mary, must be taken and held to infer a distinct and several estate in the said children as of their own right altogether apart from and independent of their mother; and therefore that the residuary legatees are not entitled to have the previous advance of £1000, made by the testator to his said daughter Mary, in her lifetime, either set off *pro tanto* against the same, or deducted therefrom in the distribution of the general succession: Repels the claim, and whole pleas maintained for the residuary legatees, so far as they are opposed to, or in any respect at variance with the rights of the said children, or any of them as above found; and especially, Finds, that the said children are nowise barred from still insisting to be preferred according to the full measure of their legal rights, in respect of their having either accepted of interest or granted discharges to the trustees of the testator, on the footing (mistaken in law), that their provisions, as given by the settlement, were truly of less amount than has now been decided: Ranks and prefers accordingly, the several claimants, Mrs Elizabeth Arbuthnot or Anderson's trustees, James Arbuthnot junr., John George Arbuthnot, William Robert Arbuthnot, and Miss Sibella Arbuthnot, *simpliciter* and *primo loco*, in terms of their respective claims; and ranks and prefers the claimants, Robert Hutchison and others, the residuary legatees, to the residue of the estate only *secundo loco*, and in so far as there shall remain a free residue after satisfaction and payment to the said other parties in terms of the present judgment, and decerns: Finds the residuary legatees liable in the expenses of the present discussion," &c.

In a note his Lordship observed,—“The Lord Ordinary, after the cases of *Fisher*, *Ewan*, and *Collier*, cannot hold the first and main branch of this decision to be other than a clear matter. It is all the stronger that the testator's daughter Mary was dead, and known to him to be so at the date of the settlement. But suppose she had been alive, had afterwards survived the testator, and had then, repudiating her liferent under the

deed, betaken herself to her legal claim of *legitim*, the case would have been identical with those referred to, and the testator's grandchildren would have had their fee entire and unaffected. In point of principle, there is nothing to support a different result, as the case stands, but rather the reverse. In truth the deed itself speaks in this very clause of the testator's daughters and their children taking according to their several rights of life-rent and fee, thereby expressly separating between the provisions respectively conferred upon each as constituting perfectly distinct and several interests and estates."

Mar. 19. 1853.
Hutchison's
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The residuary legatees reclaimed, for whom—

E. S. Gordon, stated, that he did not mean to insist further as to the subordinate point decided by the Lord Ordinary on the claim of the opposite parties being barred by their actings. On the other part of the case, he argued that the £1000 must be deducted from the other claimants, because, 1st, This is not a case of two estates, one of life-rent in the mother, the other of fee in the children. The trust created is not of such a nature as to supersede the use of restrictive words, as the trustees could have been called upon immediately to denude; so the restrictive term "only" was used in reference to the widow's provision. The principle of decision in *Williamson v. Cochran*, 28th June 1828, applies. 2d, Even admitting that there are two distinct estates, there is here a special clause as to deductions, and not as in the cases cited on the other side, a provision for the exclusion of legal claims. It says, "provision to such child or children;" by "provision," is meant the £1500, which is therefore expressly signified as to suffer the deduction; and "children," mean "grandchildren." The whole object of the truster seems to be to equalize the sums his family should receive from his estate; the deed should be read so as to attain this equality, which would be overthrown, if the advance is not deducted from the fee of the provision.

F. B. Douglas, and *Deas*, for respondents, referred to *Ewan v. Watt*, 10th July 1828; *Fisher v. Dixon*, 8th February 1839; and *Collier v. Collier*, 6th July 1838.

THE LORD PRESIDENT. I form my opinion in this case from the terms of the trust deed. I think it clear that the truster gives a mere life-rent to his daughters. The term "allenary," was not necessary, because a trust was created, and the principles of construction we apply to trust-deeds, as distinguished from deeds of direct conveyance to children, hold here. As to the deduction of the advance to Mary;—In the cases referred to, it was held on unquestionable principles, that a life-rent and a fee are distinct estates, involving separate interests, the estate only of the life-renter being affected by his acts, debts, or obligations. The question here, is—What where the truster's intentions in regard to the deductions? The clause we must construe to ascertain these is not perhaps so clear as might be desired; but when we take it along with the previous clause which creates a mere life-rent in the children, and a fee in the grandchildren, I think it is not said that the grandchildren's provisions are to suffer deduction; and the ordinary rule of law must apply. I am for adhering.

LORD FULLERTON. I concur. I cannot listen to any argument from what this deed implies; the question here, is—What does it express? Nor

Mar. 19. 1853. can I take the view, that the truster had created, not a liferent in his daughters, and a fee in his grandchildren, but one right of liferent and fee, such, that both liferent and fee necessarily went to the daughters; for the term "allenary" was not necessary here, where a trust was created for protecting the rights of both liferenter and fiar. We must hold, therefore, that there were two provisions given, and I am clear that the deductions cannot be made from the fiar's provision. It must be made from the share of the party who got the money.

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LORD IVORY remained of the opinion he had expressed as Ordinary.

LORD CUNINGHAME absent.

The COURT "adhere to the interlocutor of the Lord Ordinary submitted to review, and refuse the note: Find additional expenses due," &c.

Jollie, Strong, and Henry, W.S., Reclaimers' Agents.

Douglas and Johnston, W.S., Respondents' Agents. (J. S. M.)

No. 160.

M'NEILL v. CALDWELL AND SHEDDEN.

Process—Jury Trial—Act of Sederunt, 24th February 1846—Countermand.—Circumstances in which Held, that sufficient notice of trial had been given by the pursuer in a jury cause, in compliance with the Act of Sederunt, so as still to entitle him to the lead.

1st Division.

Jury Cause.

Mar. 22. 1853.

M'Neill v.
Caldwell, &c.

Issues in this case were approved of by the Lord Ordinary (Robertson), on 2d December 1852. On 21st January 1853, the pursuer put the case to the roll, to get his Lordship to appoint a day for trial under sec. 40 of the Court of Session Act of 1850, but no day was then fixed. On 25th February following, the pursuer had the case again in the roll for a similar purpose. It was, however, continued till the next day, in consequence of the absence of the defenders' counsel. When called on the 26th, the motion was allowed to drop, the parties not being able to agree on a day. Shortly after the parties left the bar, the defenders' agents put into the hands of the pursuer's agent, a notice of trial for the ensuing sittings. On the same day, and two or three hours later, the pursuer also served on the defenders a notice of trial for the sittings.

On 17th March, a countermand of the defenders' notice was served on the pursuer. The latter, however, being desirous to proceed, his agent, on 18th March, wrote the defenders' agent as follows:—"With reference to your countermand of trial, which was served on me last night, I think it right to remind you that of the same date with your notice of trial, viz., 26th ult., I served a notice of trial on you on the part of the pursuer, and I have now to intimate that it is my intention to go to trial on the pursuer's notice, on the day for which the cause has been set down, viz., the 25th instant." In consequence of this intimation, a notice of motion was on 19th March served on the pursuer by the defenders, to the effect that "on Monday the 21st instant, the Lord President of the Court of Session would be moved to discharge the notice of trial given by the pursuer on 26th February last."

The parties were thus brought to issue on the two notices of trial.

The *Dean of Faculty*, (with whom *Penney*), for the defenders, maintained that it was incompetent for the pursuer to give notice of trial after the defenders had done so, the former having lost the lead by not giving notice

within ten days from the date of adjustment of the issues, and that his right Mar. 22. 1853.
to the lead did not revive till ten days after the date of the countermand. M'Neill v.
Act of Sederunt, 24th February 1846. Caldwell, &c.

Neaves, with whom *Mure*, for the pursuer. The lead has never been lost, and consequently the pursuer's notice of trial could not be discharged. The object of the Act of Sederunt of 1846, was to enable the defender to force on a trial if the pursuer were unnecessarily delaying, not to deprive the pursuer of the lead, when he was anxious to proceed. In the present case, no disposition had been shewn on the part of the pursuer to delay. On the contrary, the pursuer had been doing all he could under the provision of the Court of Session Act to force on the trial. The motions before the Lord Ordinary to fix a day for trial during Session, were equivalent to notice for the sittings, and as the pursuer's notice was served on the same day that he had failed in his endeavour to get the Lord Ordinary to fix a time for the trial, and that for the first sittings after the issues had been adjusted, he had never lost his lead. *M'Cowan v. Wright*, 6th July 1852. Court of Session Act of 1850.

The Court took time, and to day—

The LORD PRESIDENT stated, that after consulting with some of his brethren of the Second Division, he was of opinion, in conformity with the pursuer's argument, that the pursuer had not lost the lead. His Lordship therefore—

“Having considered the notice of motion for the defender . . . Refuses to discharge the notice of trial given by the pursuer.”

Archibald M'Neill, W.S., Pursuer's Agent.

Smith and Kinnear, W.S., Defenders' Agents.

(J. S. M.)

ANDERSON v. GILLANDERS.

No. 161.

Ferry—Poor Law Act, 8 and 9 Vict., c. 83—Assessment.—Held, that a ferry across an arm of the sea is assessable under the Poor Law Act in respect of ownership and occupancy in that parish alone in which it is localized by the titles under which it is held.

The Ferry of Kessock affords a means of communication between the north 1st Division. and the south sides of the Moray Firth. On the south side the landing place Mar. 22. 1853. is in the parish and shire of Inverness; the landing place on the other side is in the parish of Knockbain or Kilmuir-Wester in the shire of Ross. Anderson v. Gillanders. The dues and fares received on either side are nearly equal in amount. The ferry has, for a very long period of time, belonged to the proprietors of the estate of Redcastle, situated wholly in Ross-shire in the parishes of Killernan and Knockbain; and it has been always conveyed and transmitted as a part and portion of the barony of Redcastle, along with the lands of Easter Kessock on which it immediately abuts; the lands of Easter Kessock, ferry, and salmon fishings of Kessock being described as “all lyand within the parochin of Kilmuir and Sheriffdom of Ross.” The proprietor of Redcastle also holds in feu from the magistrates of Inverness a piece of ground on the south side of the ferry, on which the landing pier is formed, and houses have been built for the accommodation of those ferrymen who attend specially to the traffic from that side.

Mar. 22. 1853.

Anderson v.
Gillanders.

The object of the present case was to determine in what parish or parishes the owner and occupant of the ferry are liable, in respect of it, to be assessed for poors' rates under the Act 8 and 9 Vict. c. 83, the interpretation clause of which includes ferries under the description of "lands and heritages." It came first into Court in the form of a multiplepoinding at the instance of Fraser, the tacksman of the ferry under Colonel Baillie of Redcastle, in which he called as defenders, Anderson, inspector of the poor of the parish of Inverness, and Gillanders, inspector of the poor of the parish of Knockbain, and consigned as the fund *in medio* a sum equal to the amount of assessment due by him in respect of his tenancy, in order that the defenders might settle their respective rights therein. Afterwards Anderson, on behalf of the parochial board of Inverness, raised action of declarator, calling as defenders all the parties who were in any way opposed to his claim, and concluding, *inter alia*, to have it declared that the ferry was to the extent of one-half within the united parishes of Inverness and Bona, and that the pursuer was entitled to have one-half of the rent assessed as effeiring to those united parishes. To this declarator, which was conjoined with the multiplepoinding, defences were lodged by Gillanders, and the record was made up and closed between the two inspectors alone. The defender pleaded, that the ferry was situated wholly in Ross-shire, and that the assessments due by the owner thereof fell to be levied exclusively by the parochial authorities of that country.

The Lord Ordinary, (Wood) " Finds, in the declarator, that in the question of liability for assessment for support of the poor, whether in respect of property or occupancy, the ferry of Kessock is to be held as being wholly within the bounds of the county of Ross and parish of Knockbain or Kilmuir-Wester ; and that, consequently, the assessment that may be imposed and levied for support of the poor from the proprietor and tenant of the said ferry, in respect of their property and occupancy, falls to be imposed by, and is due to and leviabie by the proper parochial authorities of the said parish and county, and therefore, sustains the defences, and assoilzies the defender from the conclusions of the action, and decerns. And in the multiplepoinding, prefers the defender George Gillanders, inspector of the poor of the parish of Knockbain, on behalf of the parochial board of said parish, to the fund *in medio*, and ranks him thereon *primo loco* accordingly, and decerns : Finds George Anderson liable to the defender in expenses both in the declarator and multiplepoinding." &c.

The pursuer reclaimed, for whom—

E. S. Gordon, and *Neaves*, argued that a right of ferry has reference to particular localities, viz., a stretch of water with landing-places, in reference to which alone it can be exercised. The south pier is situated in the parish of Inverness, and the stream or current of the Beauly, which flows into the head of the firth and is quite perceptible at the ferry, has always been regarded as the boundary between the two shires. The profits are derived as much from the south as from the north side. The parish of Inverness is therefore entitled to assess one-half of the rent, according to the principle established in the case of canals in *Anderson v. Union Canal Co.*, 7th March 1839. Further, it is obvious that the interpretation clause of the statute deals entirely with visible subjects having a real locality.

G. Dundas, and *G. G. Bell*, for the defender, argued that the titles fixed the Mar. 22. 1853. locality of the assessable subject in Kilmuir parish. A ferry is an incorporeal right of way, and the proprietor of it does not, like the proprietor of a canal or railway, occupy a portion of the *solum* of any particular parish. Anderson v. Gillanders.

The LORD PRESIDENT. The difficulty here has arisen from this, that, while the statute says that ferries shall be assessed as lands and heritages, it has laid down no rule as to the *mode* of assessing them. Ferries are not in the same position as canals or railways, for in their case a tangible estate, a portion of land, belongs to the parties assessed. This estate lies in various parishes, and it is the portion which has its actual locality in each parish which is assessed there, the statute only fixing a rule for calculating the assessment. Now this ferry being, under the statute, a heritage, what is its locality? We must look to the titles. Under them it forms part of the estate of Redcastle, and of the barony of that name, situated in Ross-shire; and I see from a decree of valuation of teinds of the lands and barony of Redcastle obtained in 1791, that the ferry of Kessock was valued as lying in the parish of Wester Kilmuir. The sound course is to hold that it is part of the lands with which it is united in the title, and that its locality is the parish of Kilmuir.

LORD FULLERTON. The Lord Ordinary has taken the view that presents least difficulty. There is no doubt as to the local position of this ferry, in so far as depends upon the titles, for, in so far as it can be so localized, it lies in the county of Ross and parish of Kilmuir, and is attached to the barony of Redcastle. The Inverness people, therefore, do not claim the right of ferry, but only that half the profits shall be assessed for their poor. The mere statutory enactment that *heritage* shall include ferries, cannot change the character of a ferry as an incorporeal right, or force us to treat it as a tangible corporeal subject. The statute only fixes that ferries shall be assessable, and leaves the locality to the common law construction of the case; and we must therefore hold, that the locality is fixed by the titles.

LORD CUNINGHAME having been absent at the debate did not take part in the advising.

LORD IVORY. I concur, though I must confess that I had a strong leaning to hold, that, as this ferry connects, and equally serves the parishes on either side, the rent arising from it should have been equally rated in both, giving one-half of the *cumulo* assessment to each. Had the ferry possessed a proper *territorial* existence, and fallen to be rated as a real subject covering and commensurate with the land below, and the respective landing-places attached, that would have been the more natural as well as the more equitable course. But a right of ferry as such, is not a real subject of that kind. It is a purely incorporeal right, and though connected with the locality and drawing its profits through that connection, it has in itself no proper local or visible existence. In this situation, but for the words of the statute, it would have been difficult to say that the ferry dues (unless under an assessment on means and substance, in which case they would have become available in the parish of inhabitancy,) were as such liable in law to be rated at all. But the statute having defined ferries as one of the subjects, which, for the statutory purposes, are comprehended within the general description of "lands and heritages,"

Mar. 22. 1853. we must hold that they are, like other lands and heritages, liable to assessment. The question remains, in what character and to what effect are they to be assessed? and the answer suggested by the very mode in which the statute deals with them, seems to be, that it is not as a *jus incorporale* in the shape of dues or tolls, but as an estate, in which the character of *lands and heritages* must predominate and rule. Now, in this point of view, we are compelled to go to the feudal title, under which all such estate is held; and doing so, the conclusion at which the Lord Ordinary has arrived is not perhaps a very strained one, viz., that the ferry is to be taken as an accessory of the estate of land, with which, within the feudal title, it is connected. Such estate here is unquestionably situated wholly in Ross-shire; and that portion of it on which the ferry immediately abuts, in the parish of Knockbain. I am content, therefore, not to disturb the Lord Ordinary's judgment.

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The COURT "Adhere to the interlocutor of the Lord Ordinary, subject to the following variations, viz., that in the declarator it is found and declared that the pursuer, as inspector of the parochial board of Inverness, has right to assess upon such portion of the *cumulo* rental of £800 paid by the tenant of the ferry of Kessock, as may be found to effier to the subjects held by Colonel Baillie in feu of the burgh of Inverness, and buildings and erections thereon, occupied by Alexander Fraser, the tenant of the ferry, and real raiser of the multiplepounding: And, 2dly, That in the multiplepounding the pursuer is entitled to such portion of the fund *in medio* as may be found to effier to the feu subjects above referred to; and remit to Lord Curriehill, in room of Lord Wood, as Ordinary, to see this finding carried into effect: *Quoad ultra*, Refuse the prayer of said reclaiming note: Find the defender entitled to additional expenses both in the declarator and in the multiplepounding," &c.

Hugh Ross, W.S., Agent for Anderson.

William Mackenzie, W.S., Agent for Gillanders.

(J. S. M.)

No. 162.

LINDSAY v. DAVIDSON.

Process—Interdict—Sequestration—Heritable Security—Absolute Disposition and Backbond.—Held, that it is not competent for the trustee on a sequestrated estate, by suspension and interdict, to prevent a party from levying the rents of an heritable subject in which he was infet on *ex facie* absolute disposition from the bankrupt, followed by possession of the rents since the sequestration, on the allegation that correspondence between the parties proved that the disponent was a mere heritable creditor, and that his title constituted only a burden on the fee, which had therefore passed to the trustee by force of the sequestration.

1st Division.

Mar. 23. 1853. of Lindsay, as trustee on the estates of Sir Andrew L. Hay, which had been sequestrated on 19th December 1844. It was directed against the respondent Davidson, with the view of preventing him from continuing to levy the rents of Sir Andrew's estate of Rannes, which the respondent had been permitted to do since the date of the sequestration, the complainer maintaining that that estate was the property of the bankrupt at that date, and was consequently, by force of the enactments of the sequestration statute, vested in his trustee for behoof of all concerned. The respondent founded on the following titles: *First*, An *ex facie* absolute disposition by Sir Andrew of the

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estate of Rannes in favour of Adam & Anderson, advocates in Aberdeen. It was dated 1st October 1838, and bore to be granted in consideration of a price of £1300. The disponees were infeft. *Secondly*, An *ex facie* absolute disposition of the same subjects, granted by Adam & Anderson with Sir Andrew's consent to the respondent in consideration of the price of £1263, 14s. 9d. It was dated 5th December 1840, and the respondent was infeft. On the same date he purchased from the North of Scotland Insurance Company various debts heritably secured over the estate of Rannes. The respondent stated on the record in reference to the disposition of 1838, that "he understood that it was not intended or retained as an irredeemable conveyance, but that Adam & Anderson were willing or bound to reconvey to Sir Andrew, upon being paid any debt due, or that might become due to them, or for which they were or might become liable on Sir Andrew's account:" And he further stated, that "although no express declaration passed between Sir Andrew and himself affecting his title, the respondent has always held himself bound, and been willing to grant a reconveyance to Sir Andrew on being reimbursed in the sums advanced by him, together with his whole claims against the estate." No back bond had ever been granted in Sir Andrew's favour.

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The respondent pleaded, that being vested and infeft in Rannes under an absolute conveyance, he was entitled to maintain his title and possession against all other parties, and that his readiness to reconvey on the above terms afforded no ground for depriving him of the benefit of his absolute title, as long as those terms were not complied with.

The complainer, on the other hand, averred, and referred to the correspondence between the parties and to the respondent's admissions in support of his averment, that the conveyances founded on by the respondent were not absolute and irredeemable, but constituted merely a redeemable security for £1300 lent by Adam & Anderson to Sir Andrew.

The Lord Ordinary (Ivory) "In respect the judgment of the whole Court now pronounced in the case of *Gardyne*, Repels the reasons of suspension and interdict: Finds the letters orderly proceeded: Refuses the interdict craved, and decerns: Finds the complainer liable in expenses," &c.

The complainer reclaimed; for whom—

Hector, and *H. Robertson*, argued, that it was competent to refer to the correspondence to shew the real nature of the transaction with Sir Andrew; *Robertson v. Duff*, 14th Jan. 1840. It is proved by that correspondence that the disponee was a mere encumbrancer: his right, therefore, can be no stronger, in a question not with third parties, but with parties representing Sir Andrew, than if he had held bond and disposition in security; *Bartlett v. Buchanan*, 21st Feb. 1811. The fee which thus remained in Sir Andrew under burden of the £1300 security, passed by force of the sequestration to his trustee, who is entitled to enter into possession and manage for behoof of all concerned, and who will, in the sequestration, give effect to any security or preference over Rannes which the respondent may instruct; *Lindsay v. Paterson*, 10th July 1840; *Gordon v. Millar*, 12th Jan. 1842.

Ross and *Deas*, for respondent, founded on *Gardyne v. Royal Bank*, 8th March 1851, to prove that Sir Andrew was completely divested by his con-

Mar. 23. 1853. *veynance to Adam & Anderson. A mere right of reversion passed to his trustee. It is incompetent in a suspension and interdict to spell out of a correspondence a back bond which never existed, and engraft it on an absolute title. Farther, the delay which has taken place since the sequestration bars proceedings in this summary form; Anderson v. M'Culloch, 29th Jan. 1846.*

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LORD PRESIDENT. The respondent being in possession of this estate on an *ex facie* absolute title, the trustee attempts to prevent him from drawing the rents, on the allegations that he is only an heritable creditor, and that his debts are not to the extent he pretends. On these allegations we cannot enter at all here, though in an action of declarator, or some other such action, it may be found that he is only a security holder, that his debt is extinguished, and that he must denude. In the present application we must look to the titles as they stand, and hold that Davidson is proprietor of the estate; we cannot try in this shape any competition with him for the estate.

LORDS FULLERTON and CUNINGHAME concurred.

LORD IVORY. I concur. There are three answers to this application:—
1. The feudal title absolutely divests the bankrupt, and absolutely invests the respondent, who has for years drawn the rents. The complainer's adjudication, *qua* trustee, could not carry away an estate, of which another than the bankrupt was feudal proprietor. It might give him a right to bring a count and reckoning against Davidson, as being at bottom only a creditor of the bankrupt. But at present he has no real title; and any personal right implied in the reversion is insufficient to support him in his demand for interdict; 2. Admitting the respondent has but a title in security, has he not been for years a creditor in possession? Can you jump to the contrary conclusion in a summary application for interdict? 3. The trustee has had such title as the sequestration could give him for more than two years before he brings this challenge of the title of one whose possession he has all along recognised. He cannot now come forward to oust him summarily.

It is open to the complainer to proceed, perhaps, by count and reckoning, with relative declarator and adjudication.

The COURT "adhere to the Lord Ordinary's interlocutor, and refuse the note: Find additional expenses due," &c.

Jopp & Johnston, W.S., Complainer's Agents.

Ross and Auld, W.S., Respondent's Agents.

(J. S. M.)

No. 163.

EDINBURGH & GLASGOW RAILWAY COMPANY v. MILLER AND MARSHALL.

Arbiter—Submission—Reference.—Held, that a party who has consented to act as arbiter, but has not been made a party to the deed of contract between the submitters, cannot, without their consent, and after acting for some time, throw up his office at pleasure; but must assign such a reason for so doing as the Court may deem satisfactory.

1st Division.

Mar. 24. 1853.

Edin. & Glas.
Rail. Co. v.
Miller and
Marshall.

The question raised in this case, was, whether an arbiter, who is not a party to the deed of submission, and against whom, therefore, there can be no execution under the registration clause of that deed, can at common law, and in virtue of his minute of acceptance, be compelled to execute and issue a decree arbitral?

Marshall contracted with the railway company for the formation of a portion of the line. The deed of contract contained a submission to Miller of all disputes arising under it. In virtue of that submission the whole claims of the parties were, on completion of the works, submitted to him for adjustment. He accepted by minute indorsed on the contract, proceeded with the case, and issued notes of his decision, allowing parties to represent. Marshall made several representations, which the arbiter repelled, and issued a finding in terms of his notes, but without pronouncing any formal decreet-arbital. Nearly two years thereafter, Marshall again made a representation, upon which the arbiter intimated that he was not disposed to act longer; and he subsequently, notwithstanding the remonstrances of the railway company, pronounced an interlocutor formally renouncing the submission, on the ground "that the proceedings in it are likely to require a great deal of his time and attention, and more than he can afford to devote to such a business." Marshall then, founding upon this renunciation, raised action against the railway company for payment of a balance alleged to be due to him for work done. The company pleaded in defence, that the action was barred by the submission which was still in dependence before Miller. The company further raised action of declarator against both Miller and Marshall, concluding to have it declared, 1st, That the arbiter "has not validly renounced the submission made to and accepted by him, but is bound to proceed therewith, and to decide upon and bring to a final conclusion the matters thereby submitted to him, by issuing a formal decreet-arbital;" and, 2d, "That the pursuers are entitled to enforce the obligations undertaken by the said John Miller, as arbiter."

Marshall, the contractor, pleaded in defence, that an arbiter, at all events an arbiter who is not a party to the deed of submission, cannot be compelled, at the instance of one of the parties, to proceed with the submission: that he may renounce at pleasure, or at least for any reason satisfactory to his own mind and conscience: and that Miller had assigned a valid and sufficient reason.

Miller gave in a short defence, leaving the matter entirely in the hands of the Court.

These actions having been conjoined, the Lord Ordinary (Ivory), "In the declarator, finds and declares *simpliciter* in terms of the libel, and decerns; 2d, In the original action, sustains the preliminary defences set forth in the first and second pleas in law for the railway company, and in respect thereof, dismisses the action, and decerns; and, 3d, In both actions, finds the said company entitled to their expenses respectively and severally against the other parties, so far as occasioned by each," &c.

Marshall reclaimed.

G. Young, and Inglis, (Dean of Faculty), for reclaimer, founded on *Chiesley v. Calderwood*, 30th June 1699, Mor., p. 632. Where the arbiter is not made a party to the deed of submission, there is *no contract* between him and the submitters; the latter lie under no legal obligation to him, but may dissolve the connection when they please. He therefore is equally at liberty to decline to decide. He is the man of the parties' own choice; they must, consequently, take his word, when he says that he cannot act further with justice to himself and them. If he says what is false, he is unfit to be longer trusted

Mar. 24. 1853. as arbiter ; if he says true, it would be most unjust not to liberate him. If the arbiter be bound by contract the usual result must follow, viz., imprisonment on a decree *ad factum præstandum*, i.e., on a decree to compel a man to make up his mind ; or liability in damages for breach of contract, if he has allowed the submission to expire. Such consequences were never heard of in the law of arbitration. By legal steps against him an arbiter would be converted into an enemy, and if decree was pronounced ordaining him to proceed, he could always delay by making some trifling order. The Court only give effect to such obligations as they can clearly see their way to enforce.

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Blackburn and Neaves, for the respondents. A trustee, a tutor, every person who holds *munus publicum*, cannot resign at pleasure ; neither ought an arbiter to possess this power, which would be productive of gross injustice. The difficulty of enforcing an obligation is no ground for not declaring it to exist. By the arbiter's acceptance the submitters have a *jus quæsitum*, which they can only lose on his renunciation being accepted by the Judge *causâ cognita*.

The following authorities were quoted : Dig. Lib. iv., tit. 8, l. 3, § 1, 3 ; and l. 15. Reg. Maj., b. ii., cap. 4, § 7. Hope's Major Prac., part 5, tit. 15. Mackenzie's Instit., tit. 3, p. 4. Spottiswoode's Styles, p. 213 ; Ed. 1708. Bankton, L. i., tit. 23, § 14, and L. iv., tit. 45, §§ 132, 133. *Jerviswood*, 4th Dec. 1702, Dict. 9435, and 2 Fount., p. 15 ; *Cairncross v. Hunter*, 8th Feb. 1702, Dict. 632 ; *Skeen*, Dict. 9436. In *Chiesley's* case the Court only refused to grant a *summary* remedy, because there was no obligation on which *summary* diligence could be used ; see Ersk., b. iv., tit. 3, § 30.

THE LORD PRESIDENT. I am for adhering. There may be cases in which an arbiter may be well entitled to give up his office, e.g., on account of his health, or of some interest of his own emerging. But the validity of his reason must be judged of by the Court. There is no incompetency, therefore, in an action to have it found that he must go on. If decree goes against him, the question may arise how he is to be compelled to discharge his duty. We have no such question here. I have no difficulty in holding that the arbiter, in this case, assigned no sufficient reason for not continuing to act.

LORD FULLERTON. Looking both to principles and to consequences, I have no difficulty in concurring. It is preposterous to maintain that an arbiter who has accepted and acted is not bound to go on, but may retire at his own discretion, unless the old course has been followed of inserting a clause of registration in the submission. The greatest possible injury would result from such a power. Such is not our law, as it is not that of Rome, or of the Code Napoleon. *Chiesley's* case only ruled that *summary diligence* could not be used against an arbiter who had not consented to a clause of registration.

LORD CUNINGHAME. It is the law of Scotland that an arbiter cannot resign his office without stating a sufficient reason for so doing. What shall be deemed a sufficient cause must depend on the specialties of each particular case ; and the Court will probably not scan it too critically, as the leaning of the law must be to liberate a conscientious man from a duty which he feels, on reasons satisfactory to himself, that he cannot discharge with propriety. Here Miller has not stated any reason to unfit him for the discharge of his duty.

LORD IVORY concurred.

The Court "adhere to the interlocutor of the Lord Ordinary submitted to review, and refuse the note; Find the reclaimer liable in additional expenses,"

&c.

Lockhart, Morton, Whitehead, & Greig, W.S., Reclaimers Agents.
David Smith, W.S., Agent for the Railway Company.

Mar. 24. 1853.
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 Marshall.
 (J. S. M.)

HAMILTON'S EXECUTORS v. HOPE, &c.

No. 164.

Proof—Writ—Right in Security.—Held, that the mere narrative of a debt to a certain amount in a deed purporting to be a disposition and assignation of effects in security thereof, but containing no obligation to repay, is not, *per se*, evidence upon which decree of constitution can be pronounced.

This was an action raised before the Sheriff of Edinburgh by the executors of Hamilton, with the view of obtaining a *pari passu* preference, in terms of Act of Sederunt of 28th February 1662, upon the proceeds of the furniture of the late Countess of Strathmore, which had been sold by the defenders, her executors-creditors, for behoof of themselves and her other creditors. The debt claimed by the pursuers was L.1500, with interest, to instruct which they libelled merely upon two deeds granted in favour of their author. The first was dated in 1823, and purported to be a disposition and assignation by the Countess, with consent of her husband, and by the Earl himself. It proceeded upon the following narrative:—"Considering that James Hamilton, W.S., previous to the marriage of me the said Marianne Countess of Strathmore with the said Earl, did advance to me, and for my use and behoof, divers sums of money, amounting to the sum of L.1500; and that he has, since the period of my said marriage, incurred a considerable debt for law expenses in the protection of my separate estate held by me, secluding the *jus mariti* of my husband, and for which I am accordingly responsible; and that I, the said Earl, am also indebted and owing to the said James Hamilton divers large sums of money, and for which several advances it is just and reasonable that he should be assigned into such securities as we have it respectively in our power to give." It then stated, that in 1820, on the departure of the Earl and Countess from Scotland, their furniture had been handed over to Hamilton as a security for the said advances, and had continued ever since in his possession; and that as there was no immediate prospect of their being able to discharge their respective engagements, it was right to grant him a formal assignation to the said furniture. Then follows the clause of assignation in Hamilton's favour in security of the advances; but the deed contained no obligation to repay them. The second deed was executed by the Countess in 1848, after her husband's death. It narrated the previous deed, which she ratified, approved of, and confirmed in all respects. Hamilton never obtained actual possession of the furniture, which remained in the Countess's apartments till her death; but the pursuers pleaded, that an assignation in security, proceeding upon the narrative or acknowledgment of a debt, forms a valid ground of debt to the amount acknowledged, even though the subject assigned in security may never have been, and may never become available. The defenders denied the contraction of the debt, and their first plea was, that the documents libelled on do not instruct the pretended debt in a question with the defenders.

Mar. 24. 1853. The Sheriff assoilzied the defenders, and, on advocacy, the Lord Ordinary (Robertson) "remitted *simpliciter* to the Sheriff."

Hamilton's
Executors v.
Hope, &c.

The pursuers reclaimed, for whom—

Wood, and the Dean of Faculty (*Inglis*), argued that the best evidence of the existence of a debt is the debtor's acknowledgment. This is the only evidence of the debt in personal bonds. That the security proved worthless does not prevent us from founding on a separate and distinct part of a deed, which was expressly intended both to give security, and to serve as a letter of acknowledgment.

Patton, for defenders. The alleged debt is merely the inductive cause of granting the assignation, but the narrative of a debt does not establish its existence, "*non creditur referenti nisi constet de relato*." The sole purpose of the deed was to grant the assignation, and it has proved abortive; the mere incidental allusion in such an abortive deed to a debt cannot establish it.

The LORD PRESIDENT. I cannot hold that an assignation in security is sufficient evidence, *per se*, of the subsistence of the debt secured, at the cedent's death. Such a deed is not a bond; it is not a deed on which the payments of a debt are marked, or by the cancellation of which a debt is extinguished. Its nature is not to constitute a debt, though there must be *in gremio* of it reference to one.

LORD FULLERTON. These documents are the only ground of action, and the question is, whether the statement of a debt, intended as a preface to a deed which attempts to grant a security, but is ineffectual for that purpose, is good evidence that the debt subsists at present. I cannot hold this, though I have had some difficulty. But it is said that the narrative is to be treated as an I. O. U. Even granting this, we have little authority in our law for determining the effect to be given to I. O. Us. No doubt, such a document is evidence that at its date the debt was owing, but how long is that to endure? It is certainly good evidence to put before a jury; but it does not, *per se*, entitle the holder to demand payment.

LORDS CUNINGHAME and IVORY concurred.

The COURT "Recal the Lord Ordinary's interlocutor; . . . advocate the cause; sustain the first plea in law for the defenders, and find, in terms thereof, that the documents produced by the pursuers do not instruct the pretended debt, in support of which they are produced, in a question with the defenders, and assoilzie the defenders from the conclusions of the summons in the present action as laid: Find the pursuers liable in expenses both in this and the Inferior Court, but subject to modification, and remit," &c.

Hunter, Blair, and Cowan, W.S., Pursuers' Agents.

J. A. Robertson, S.S.C., Defenders' Agents.

(J. S. M.)

No. 165.

DEUHURST v. GARDINER.

1st Division.

Agent and Client—English Solicitor—Alleged Double Charges.

Mar. 24. 1853. The pursuer, an English solicitor, raised action against the defender, for payment of a business account for suing a debtor of the defender in the Liverpool Borough Court.

Deuhurst v.
Gardiner.

The defender admitted the employment, but maintained that although the documents of debt were two bills of exchange, granted by the party sued in England, in his (the defender's) favour, and ought to have been included in one action, the pursuer (Deuhurst), had improperly raised an action on each bill, whereby double expenses had unnecessarily been incurred. Mar. 24. 1853.
Deuhurst v. Gardiner.

The Lord Ordinary (Cowan), decerned in terms of the libel.

The defender reclaimed.

Shand, for the reclaimer. The pursuer does not dispute that one action would have sufficed. If so, two suits should not have been raised.

Monro, contra. The defender has not properly averred that the pursuer's conduct in raising two actions was in violation of his professional duty, and the course followed was usual and customary.

LORD IVORY. The defender maintains in his record, and at the bar, that two actions were "unnecessary and improper." That is quite enough, and the Court cannot listen to a professional person in the position of the pursuer urging such a plea with respect to his own business account. There must be farther investigation.

The Court, before answer, remitted to the taxing officer of the Borough Court of Liverpool, to peruse the record and documents, and report his opinion in the case, and to tax the account sued for.

John Ronald, S.S.C., Agent for Pursuer.

John Rutherford, W.S., Agent for Defender.

(R. S.)

M'NEILL v. CALDWELL.

No. 166.

Process—Issue—Amendment of.—Held competent to amend an issue on the eve of a jury trial, by substituting words which adapted it to the statements on record, instead of an expression which gave an erroneous representation of these statements, the parties being clearly at one as to the real question at issue.

The question here related to the competency of amending an issue on the eve of a jury trial. The record had been closed on summons and defences. 1st Division.
Jury Cause. The principal copy of the summons set forth that the defender had purchased from the pursuer "thirty two year old stots," at £4, 10s. per head, and concluded for payment of £135, being thirty times £4, 10s. The defences correctly dealt with the claim, as a claim for the price of thirty two-year-old stots. But in the printed copy of the summons, the claim was set forth as for the price of "thirty two-year-old stots," and the issue as framed was, whether the defender had purchased "thirty-two or thereby one-year-old stots." On the day before the trial, and in chambers, the pursuer, for whom— Mar. 24. 1853.
M'Neill v. Caldwell.

Neaves, with whom *Mure*, moved the presiding Judge for leave to amend the issue by deleting the words quoted, and inserting "thirty two-year-old stots." The parties are evidently at one as to the sum concluded for, and the real matter in dispute. This is a mere clerical error, or at any rate such a palpable inaccuracy, that the presiding Judge may competently allow the pursuer to amend it. *Macfarlane's Practice*, p. 75, and cases there referred to. *Edwards v. Begbie*, 28th November 1850.

Mar. 24. 1858.

McNeill v.
Caldwell.

The *Dean of Faculty*, with whom *Penney* and *Patton*, for the defender, denied all knowledge of the transaction, and of what the claim made by the pursuer really was. This is not a mere clerical error in an issue; but a deliberate statement. Such an amendment as that proposed is equivalent to settling a new issue, which can only be done by interlocutor of the Court, subject to the review of the House of Lords. It is incompetent to make it on a motion in chambers.

The LORD PRESIDENT. If this amendment amounts to the settling of a new issue it is plainly incompetent; if it only amounts to the correction of a clerical error it is not so. The correction of the specification of the year in a case cited by Mr Macfarlane, appears to be a strong case in point, but I will consult the Lord Justice-Clerk who is in the Court of Justiciary.

After consultation,—

The LORD PRESIDENT stated that the Lord Justice-Clerk had no doubt that this was merely an inaccuracy which might competently be corrected, and that this opinion entirely coincided with his own.

Amendment therefore allowed.

Archibald McNeill, W.S., Pursuer's Agent.

Smith and Kinnear, W.S., Defender's Agents.

(J. S. M.)

No. 167.

GILMOUR v. GORDON.

11 and 12 Vict. c. 36—*Entail Amendment Act*—*Prohibitory Clause*—*Irritant Clause*—*Resolutive Clause*—*Construction*.—It being declared in the last member of a prohibitory clause, that it should not be lawful "to do any other fact or deed," &c.—*Held*, that the expression in the irritant clause, that "not only all such facts and deeds &c., shall be void and null," could not be restricted to apply to the last member only of the prohibitory clause, but had a retrospective application to the whole of the things prohibited.

Where a resolutive clause ran,—“And do hereby declare”:—*Held*, that the want of the nominative did not effect the validity of the clause:—*Held*, also, that the expression in a resolutive clause “upon the contravening of the said provisions or either of them” applied generally to every act of contravention, and not to one of two merely.

1st Division.

Mar. 24. 1858.

Gilmour v.
Gordon.

This was an action of declarator at the instance of the heir of entail in possession of the lands and barony of Craigmillar, against the heirs substitute of entail, concluding to have it declared that the entail is invalid and inoperative to protect the estate against the diligence of his creditors or his own voluntary deeds. The objections to the entail mainly relied on by the pursuer, were, (1). That there was no effectual irritant clause as regards sales and alienations. And (2). That the resolutive clause was defective and ineffectual. The prohibitory clause was specific and precise. The irritant clause was as follows:—“Declaring always that in case the said John Gilmour my son, or any of the said aires of tailzie, shall act or do in the contrairie, that not only all such facts and deeds, with all that may follow thereupon, shall, *ipso facto*, be void and null,” &c. And the resolutive clause so far as objected to, was as follows:—“And do likewise hereby declare that the person contraveener shall immediately upon the contraveining of the said provisions or either of them,” &c. (1.) In regard to the irritant clause, it was contended that it was limited to “all such facts and deeds,” and that these words have reference to the

last member only of the prohibitory clause, whereby it is declared that it shall not be lawful for the heirs of entail "to contract debts, or to do any other fact or deed, either civil or criminal, whereupon the samen lands, baronies, teinds, and others above written, or any part thereof, may be appraised, adjudged, evicted," &c. It was conceded that the irritant clause struck at all such facts and deeds, including the contracting of debt, which, by the conception of the prohibitory clause, and especially by the use of the word "other" was regarded as a "fact or deed;" but it was denied that the irritant clause had any more extensive or retrospective application.

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(2.) In regard to the resolute clause, the objections chiefly pressed, were, that the clause was defective from want of a nominative "and do hereby likewise declare," instead of "and I do hereby likewise declare." This, it was alleged, rendered the clause altogether unmeaning. (3.) That the word either, in the expression, "contravening of the said provisions or *either* of them," can only apply to one of *two* provisions, not to one of three or more provisions—and that as there were more than two provisions, the clause was inoperative.

Defences were lodged, maintaining that the irritant clause must in sound construction be held to apply generally to the whole of the things prohibited, and also that the resolute clause was equally valid and unexceptionable. A record being made up,—

The Lord Ordinary (Colonsay), sustained the defences, and found the defender entitled to expenses.

In a note, his Lordship stated, that in his opinion the pursuer's reading of the irritant clause was a constrained and inaccurate reading of it. "This clause read by itself is broad enough. If any of the heirs 'shall act or do in the contrairie,' means in the contrary of what is before prescribed or prohibited, not of any particular part of it more than another, but of the whole or any part of it—in any respect 'in the contrairie.' Then, if they shall act or do in the contrary, 'all such facts and deeds,' shall be *ipso facto* void and null. This is to say, that if they act or do in the contrary, what they so act or do, or all such actings or doings, or all such facts and deeds, shall be void and null. But even if the irritant clause was to be read on the principle contended for by the pursuer, of limiting the expression 'facts and deeds' to things that are in the preceding prohibitory clause described or treated as 'facts and deeds,' there seems to be no sound principle on which its application can be limited to the last of the things that are treated in the prohibitory clause as facts and deeds, instead of embracing all the things that are so described or treated; and if it shall be allowed to embrace all things so described or treated, it will embrace the whole of the first class of prohibitions, being those having reference to alteration of succession, for that member of the prohibitory clause is wound up with the expression 'nor do any *other* fact or deed &c.,' just in the same way as the last member of the prohibitory clause which has reference to the contracting of debt. The intermediate member which has reference to sales and alienations, is not wound up with any such expression, probably because it contains in itself a full enough enumeration. But selling and alienating are in themselves, and in the sense of the entail, as much facts and deeds as altering the order of succession, or contracting debt, and if the force of the

Mar. 24. 1853. irritant clause is to draw back not only to the last, but to the first member of the prohibitory clause, it is difficult to elide its effect on the intermediate member."

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As to the objection to the resolute clause, "it did not appear to the Lord Ordinary that these criticisms were of sufficient importance to destroy the entail."

Against this interlocutor the pursuer reclaimed.

Fraser and Neaves, for the reclaimer.

Dundas, H. Robertson, and the *Dean of Faculty*, for the respondents, were not called on.

The COURT expressed their concurrence with the views stated by the Lord Ordinary in his note. They therefore "adhere to the Lord Ordinary's interlocutor submitted to review, and refuse the note: Find additional expenses due," &c.

Hay & Pringle, W.S., Pursuer's Agents.

G. L. Sinclair, W.S.,

Walker & Melville, W.S., } Defender's Agents.

(J. S. M.)

No. 168.

CUNNINGHAM v. GEMMELL.

Right of Property—Declarator—Possession.

1st Division. This was an action of declarator of right to a coal cellar, in a common stair, in a large tenement in Antigua Street, brought by the proprietor of certain portions of the tenement against the proprietor of certain other parts. The cellar was expressly mentioned in the titles of neither party. The defender had been in possession of it for upwards of twenty years, and pleaded that by nothing but proof of an adverse possession for forty years could his possession be now disturbed.

Mar. 25. 1853.
Cunningham
v. Gemmell.

The Lord Ordinary (Robertson), inspected the premises, along with an architect, and on a consideration of the way in which the tenement had been originally constructed, and the mode in which it had been divided among the other proprietors, decerned in terms of the libel, and ordained the defender to remove from the cellar.

The defender reclaimed.

Shand, for reclaimer. Though the value of the subject here is small, the principle involved is one of great importance. Neither party is infest in the subject *pro expressum*, both have a sufficient title to prescribe to it, and the defender is in possession for twenty years. Nothing can remove him but a proof of an adverse possession for a sufficient period.

Dean of Faculty, (*Inglis*). The doctrine maintained by the defender would make possession for twenty years equally good as for forty. The Lord Ordinary has disposed of this case properly, on considering the fabric itself, and the rules of division adopted in the other floors.

The COURT, before decision, remitted to a commissioner to take a proof of the averments of parties.

Cunningham and Walker, W.S., Agents for Pursuer.

L. Mackintosh, S.S.C., Agent for Defender.

(R. S.)

PATTENS, (Assignees of the Renfrewshire Bank), v. The ROYAL BANK No. 169.
OF SCOTLAND.

Bankruptcy—Sequestration—Ranking—Dividend—Title to pursue—Retention.—A creditor was ranked on a sequestrated estate in respect of several bills endorsed by the bankrupt, and drew a first and second dividend. He then withdrew eight bills as paid by the primary obligants, and ranked for a third and fourth dividend on the balance as restricted. The bankrupt was discharged on payment of a composition, which the creditor also drew on this balance, and the bankrupt was reinstated in his rights. Thereafter his assignee raised action against the creditor, alleging that the latter had received full payment of the eight bills from the primary obligants over and above the dividends drawn thereon, and concluding for repetition of the over-payments. It appeared that the payments had been received from the primary obligants on some of these bills before the ranking for the second dividend:—*Held*, 1. That the reinstated bankrupt, and consequently his assignee, had a good title to pursue for an emergent estate; 2. That this claim did not involve the repetition of dividends, or an interference with a settled ranking; and, 3. That the defender could not plead retention in respect the whole debt for which he had ranked had never been paid in full.

In 1842 the estates of the Renfrewshire Banking Company and of William 1st Division. Napier and Roger Aytoun, its sole surviving partners, were sequestrated. Mar. 28. 1853. The Royal Bank lodged a claim to be ranked, and to draw dividends in respect of a debt of £11,189, 6s., which was made up of the sums contained in 53 bills specified in an account annexed to the affidavit. These bills had been indorsed by the Renfrewshire Bank to, and discounted by, the Royal Bank. Three of them were, before the ranking, deducted by the Royal Bank on payment being received in full from the primary obligants, leaving a balance of £10,115 : 14 : 3, for which they were ranked, and on which they drew two dividends, amounting together to 5s. 8d. per pound. On 31st January 1845 the Royal Bank deducted from the ranking, as having been fully paid, nine bills, amounting to £2936 : 16 : 9, and restricted their claim in the sequestration to £7178 : 17 : 6, the balance after such deduction, on which they subsequently received two farther dividends. In 1847 the bankrupts offered a composition of 1½d. per pound, which was accepted by the creditors, including the Royal Bank, the sequestration declared at an end, and the surviving partners reinvested in the estates of the Company, and in their own private estates, by act and warrant of the Sheriff, confirmed on 23d July 1847. The above balance of £7178 : 17 : 6, was recognised as the amount of the Royal Bank's claim in carrying through the composition, which they accordingly received upon that sum; and the statement of assets submitted by the bankrupts to their creditors in the course of the composition arrangement contained no notice of any claim competent to them against the Royal Bank.

The bankrupts being thus reinvested, assigned their rights to Messrs Patten, who brought the present action against the Royal Bank in 1849. They averred that the defenders had, prior to 31st January 1845, received full payment from the primary obligants in eight out of the fifty-three bills on which the two first dividends had been drawn, "*over and above the said dividends*;" "but the precise dates at which the payments were made, though well known to the defenders, are not known to the pursuers otherwise than from an entry in the said state, bearing the said date of 31st January 1845, withdrawing the said bills" (together with a ninth bill, about which no ques-

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Mar. 28. 1853. tion is here raised) "from their claim, in respect they had been prior thereto paid by the defenders." The summons concluded for exhibition of "a full and particular state or account showing the whole sums received by the defenders from the several obligants in the said eight bills and promissory notes, whereby the sum overpaid to the defenders on each of the said bills, &c., and due by them to the pursuers" may appear; and for payment to the pursuers of the amount of over-payments so received, as forming part of the estates on which the pursuers' authors were reinvested.


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The defenders alleged, that on several of the bills the payments from the primary obligants had been received prior to the ranking for the second dividend, on all of them before the fourth dividend, and they pleaded, 1. That the pursuers had no title to sue for sums now alleged to have belonged to the bankrupt estate, as they did not represent the trustee and creditors; 2. That their claim was excluded by the composition contract, which operated a mutual discharge, *hinc inde*, of all claims at its date between the bankrupt and creditors; 3. That it was incompetent, as being for repetition of dividends paid under a sequestration, or for payment of sums alleged to have been owing to the bankrupt estate before the creditor was ranked for dividends; 4. That at all events it was irrelevant and inadmissible as regards the sums drawn from the primary obligants prior to the second dividend; 5. That, supposing the defenders liable, they were entitled to allowance for the expense and loss occasioned by the failure of the obligants in the various bills in prompt payment; 6. That, in any view, the defenders were entitled to retain the over-payments and set them off against the balance which still remained due to them on the whole sums ranked for. The pursuers pleaded, 1. That the Royal Bank could recover no more than full payment of each bill from the obligants therein jointly and severally; 2. That having received from the Renfrewshire Bank, the secondary obligant, 5s. 8d. per pound on each bill, they ought to have drawn only the balance from the primary obligants, and then to have conveyed the bills to the Renfrewshire Bank that they might operate their relief of what they had paid, against the latter; 3. But as they drew not merely the balance but the whole sum in each bill from the primary obligants, they are liable to the Renfrewshire Bank for the excess of 5s. 8d. per pound on each bill; 4. That this excess was part of the bankrupt's funds to which the pursuers' authors acquired a good title by the discharge in their favour under the bankrupt statute, and the pursuers were validly vested in the right thereto; See *Biggar* (erroneously *Bell*) v. *Carstairs*, 17th December 1842; *Baillie v. Young*, 14th February 1835; 5. That it was irrelevant to plead that the sums recovered from the primary obligants were paid prior to the ranking for the second dividend, seeing the defenders are bound to account for any excess received by them above 20s. in the pound; 6. That the objection on the composition contract was irrelevant, as the defenders were not concurring creditors therein in respect of the bills libelled, which had been previously withdrawn from the ranking; and all the other objections to the pursuers' title were equally irrelevant, as they did not challenge the validity of the defenders' ground of debt, or securities therefor.

The Lord Ordinary, (Wood), "sustains the defences, and assoilzies the defenders." His Lordship in a note observed: "Whatever may have been the

rights of parties in regard to the defenders' claim, or the bills of which it was ^{Mar. 28. 1858.} composed, whatever right there might have been in the trustee or creditors in respect of the sums received by the defenders on the bills in question, to limit ^{Pattens v. Royal Bank} or modify the defenders' ranking in the sequestration, or to restrict the amount of ^{of Scotland.} the debt upon which they were entitled to be paid a composition, the Lord Ordinary is of opinion that it is now too late to attempt to alter the defenders' position, and that the demand of the bankrupts, or of the pursuers as in their place, for the accounting concluded for, cannot be sustained."

The pursuers reclaimed.

Wood and Dean of Faculty (Ingles), for reclaimers.

Monro and Neaves, for Royal Bank.

LORD FULLERTON. After much difficulty, I have arrived at the opinion that this interlocutor cannot be supported, and that the pursuers are right. It is clear that the defenders have money in their hands which they are bound to account for to somebody; for we must throw out of view the notion that they are entitled to set off the surplus payments on the bills in question against the balances due on the other documents of debt which they held against the bankrupt estate. It is impossible to take that view. But the great difficulty consists in supporting the present claim on the ground of its altering a scheme of ranking acknowledged for several years. On a careful examination, there seems to be no interference here with any ranking. If there were, I would have great difficulty indeed. The ranking was quite right. But the defenders have not accounted for the surplus payments they drew. In holding them liable to repeat these, I cannot see how the ranking is touched. I think the bankrupt's assignees stand now in right of these over-payments; but, at all events, the defenders have no right to them whatever. The creditors of the Renfrewshire Bank may still get the benefit of them by a reduction of the composition contract, a course which was successful in *Baillie's* case. The defenders cannot be allowed to retain in their pockets money which should never have found its way there at all.

LORD CUNINGHAME. I concur. It is impossible to exercise a right of retention upon sums which have been levied *sine titulo*, over and above what was legally due. Were we to allow this, we would be returning to the principles of the noted case of *Glendinning v. Montgomery of Magbiehill*, Dict., p. 2573, a decision ever since held up to the disapprobation of the profession.

LORD IVORY. I am of the same opinion. Any other result would be inconsistent with justice. A party who receives more than full payment holds the excess as a trustee merely. Had the sequestration, therefore, still been depending, it would be impossible to hold that this surplus did not form part of the bankrupt estate, which the creditors could have claimed, and for which the holder must have accounted, just as if the person who had right to it were solvent. There is no repetition of dividends here; there is an emergent estate, which has arisen by the very force of the payment of the dividends. The Royal Bank is in possession of the surplus as trustee; the dividend remains. It is impossible to maintain the doctrine that the surplus on one bill can be security for another. The whole relations of parties were settled from the date of the first deliverance; it is then that the character of security on

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a debt is fixed; and if no security has then been created upon one bill for the rest (and there cannot be such security for payment of more than 20s.), that cannot be altered by anything done in the course of the sequestration. The question,—What are the rights of a reinstated bankrupt? Whether he has all the rights of the trustee? is one of fact. I think that here the bankrupt had all in him that the trustee had, and that his assignee can claim the sums in question. It is said plausibly, but unsubstantially, that the general body of creditors will be defrauded by this of what would otherwise have gone as dividends among them. That was said in the cases of *Baillie* and *Biggar*, but the Court would not enter into that; it is a matter for the general creditors themselves, who may reduce the composition contract if they see it to be open to objection.

The LORD PRESIDENT. Looking to the origin of these transactions, as being the discount of bills, and looking to the bills as the grounds of debt, it is impossible to contend that the surplus on one bill should be applied in relief of the deficit upon the others. They had nothing to do with one another. The Renfrewshire Bank were the immediate, though not the proper and original, debtors in these bills. They were, therefore, from the first entitled to recover from the proper and primary obligants any sums they might pay to the holders; they are now entitled to recover from the Royal Bank, as holding the funds liable in relief. It is not a repetition of dividends, but a claim of relief from dividends paid. I am satisfied that there is here no disturbance of a final settlement in a sequestration. This case is ruled by those of *Baillie* and *Carstairs*.

The COURT "recal the interlocutor of the Lord Ordinary reclaimed against; find that the defenders are bound to account to the pursuers for all sums received by the defenders on the bills libelled, over and above 20s. in the pound, with the legal interest of any such over payments from and after the date when the same were received: Find, therefore, that the defenders are bound to exhibit and produce, in terms of the first conclusions of the libel, and remit to Lord Curriehill, in room of Lord Wood, to proceed accordingly: Find the pursuers entitled to the expenses hitherto incurred, including those incurred in the Inner House, as well as those incurred in the Outer House, and remit," &c.

John Patten, W.S., Pursuers' Agent.

Dundas and Wilson, W.S., Defenders' Agents. (J. S. M.)

No. 170.

GREIG v. MAXWELL.

8 and 9 Vict. cap. 83, sec. 47—*Poor Law Amendment Act—Assessment—Harbour and Docks—Lands and Heritages—Owners of Vessels—Ship's husband.—Held*, that a harbour and docks are not premises within which the owner of vessels resorting to them carries on business in the sense of the statute; and that the fact of a ship's business being transacted by a ship's husband, who resides within the parish in which the harbour and docks are situated, does not render the owner liable to be assessed for poors' rates within that parish, he being assessed on his means and substance in the parish in which he resides.

1st Division.

Mar. 28. 1853.

Greig v.
Maxwell.

This was a suspension of a threatened charge at the instance of the collector of poors' rates for Montrose, for poors' rates alleged to be due by the suspender for the year 1847. The action was originally brought before the

Sheriff. Proof was led, and the following were the facts established. The suspender resides in the parish of Craig, and he is assessed on his means and substance for the poors' rates payable in that parish, in respect of his residence therein. He is part owner of two vessels belonging to the port of Montrose, and he is also master of one of them. These vessels are employed in the trade between Montrose and the Baltic, and on their return at the end of the season, are generally laid up for the winter in the harbour of Montrose, and while lying there, pay the usual harbour or dock dues. After the last Baltic voyage for the season, they are employed occasionally in bringing cargoes of coals from ports on the coast to Montrose, where they are sold.

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In these circumstances, the suspender was assessed for poors' rates for Montrose, on the ground that he carries on the trade or business of a shipmaster and of a shipowner at that port, and that the harbour and dock is in the sense of the statute 8 and 9 Vict. cap. 83, § 47, the premises in which the suspender as a shipmaster and shipowner carries on his trade or business as such; and that therefore occupying the harbour or dock of Montrose, he occupies lands and heritages in that parish in the sense of the statute.

Defences were lodged, and the suspender pleaded that he was not possessed of any lands or other heritages in the parish of Montrose, and that as he carries on his trade or business of a shipowner, and his calling as a shipmaster, not in the harbour of Montrose merely, but throughout the world, and on the seas, he can only be assessed in respect of his means and substance for the support of the poor of the parish where he has his residence.

The Sheriff-substitute, (Dickson), sustained the defences, but on appeal the Sheriff (L'Amy), repelled them, and found the defender liable in expenses. The collector of poors' rates thereupon threatened the suspender with a charge which he suspended; and the Lord Ordinary, (Colonsay), reported the whole case to the First Division.

The case was called to-day..

Campbell, and the *Dean of Faculty*, appeared for the suspender.

T. Mackenzie, and *Deas*, for the respondent.

THE LORD PRESIDENT. I do not think that this is a case to which § 47 of the Poor Law Amendment Act applies. This party is assessable in the parish in which he resides on his whole income, except such part of it as is assessable elsewhere. It is far from the intention of the statute to attach a liability on the ground pleaded by the respondent, viz., that because the suspender goes into the harbour of Montrose, he is therefore to be considered as an occupier of lands and heritages. The owners of any other vessels coming into the harbour would be equally liable. The proper occupants of the harbour in the sense of the statute, are those who derive profit from the use which vessels make of the harbour. It is said that the business of the ships is carried on at Montrose through a ship's husband. But the business of a ship's husband is a separate trade and calling, and the ship's husband will be assessable in Montrose on the profits of the business carried on there by him. Nor is the ship's husband agent for these ships alone, but he is in the position of a general agent or broker. It is out of the question to hold that every person who has an interest in a vessel sailing from Montrose, is to be assessable there on his means and substance, no matter in what part of the

Mar. 28. 1853. country he may reside. Besides, these vessels do not necessarily return to Montrose after each voyage. They may take a freight from the Baltic to other ports. The mere residence of the ship's husband being at Montrose does not necessarily bring her to Montrose.

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LORD FULLERTON. I have no doubt on the subject. There is something more requisite to render this person assessable in Montrose than the mere fact that he carries on business there. He must occupy premises in Montrose, within which he carries on such business. That he is liable as an occupant of the harbour, appears to me a very hopeless proposition. The liability being expressly put by the statute on the occupancy of premises, the question in this case is relieved of all doubt.

LORDS CUNINGHAME and IVORY concurred.

The COURT therefore "sustain the reasons of suspension, recal the interdictor of the Sheriff: . . . Find the suspender entitled to expenses, both in this Court and in the Inferior Court," &c.

James Morgan, S.S.C., Suspenders Agent.

James Burness, S.S.C., Respondent's Agent.

(J. S. M.)

No. 171.

HALBERT v. DICKSON.

Trust—Vesting—Clause.—A truster directed his estate to be divided amongst certain parties named by him, "one share" to be "lent out by my said trustees in the way before mentioned (i. e. on good heritable or personal security) and the interest thereof paid to my said nephews and nieces during their lifetimes, and at their respective deaths, the capital sum or share to be paid to their children," &c. The truster was survived by a niece, two of whose children predeceased her:—*Held*, that her children had a vested interest in the share of which she enjoyed the life, and that the vesting of the fee was not suspended by the subsistence of the trust until payment of the capital.

1st Division.

Mar. 28. 1853.

Halbert v.
Dickson.

In 1806 Thomas Johnston executed a trust-settlement of his whole estate, heritable and moveable. He directed his trustees after paying his debts and special legacies, to convert his whole property into money, and divide it into two equal parts. The first of these was to be divided among the family of the deceased Alexander Johnston his brother, and the second among the family of Elizabeth Johnston his sister. As to the first no question was here raised; with regard to the second half, the deed bears:—"I will and ordain the same to be divided into seven equal parts or shares, and to be appropriated as follows:—viz., one share to be paid by my said trustees to the said Tristram Lowther; and one share to each of the said William Lowther, George Lowther, merchant in Dornoch, and Christian Lowther, spouse to David Dickson of Hardridge Lodge, and two shares to Mary Lowther, spouse to Gavin Irving, tanner in Annan, all my nephews and nieces, and children of the said Elizabeth Johnston, I appoint to be lent out by my said trustees in the way before mentioned, (i. e., on good heritable or personal security), and the interest thereof paid to my said nephews and nieces during their lifetimes, and at their respective deaths the capital sum or share to be paid to their children equally and proportionally, share and share alike."

Thomas Johnston the truster died in 1815. He was survived by Christian Lowther or Dickson, who died in 1847. She was survived by her daughter Jane Dickson the defender, her other two children, John Dickson Lowther, and Elizabeth Dickson or Halbert, having predeceased her.

The share of the trust-estate liferented by Christian Lowther or Dickson, ^{Mar. 28. 1853.} and falling to her children in fee, amounted to £842 : 5 : 1⁵/₈. On her death, ^{Halbert v. Dickson.} the husband of her predeceasing daughter, Elizabeth Dickson or Halbert, claimed one-half of the share of Johnston's trust-funds, which belonged to Mrs Dickson and her children. He pleaded that the fee of that share of the trust-funds had vested in the children of Mrs Dickson on the death of the truster, and he maintained that his wife was entitled to one-third of it in her own right, and to a half of another third as one of the two executors of her brother, who had predeceased her.

Miss Dickson, the sole surviving child of Mrs Dickson, contended that the fee did not vest till after the death of the liferentrix, and as Mrs Halbert had predeceased her mother, she had no claim to any share of the trust-funds, either in her own right or as executrix of her brother; and she founded on certain transactions as importing a discharge of any interest, or contingent interest, in the share of the residue sufficient to exclude any claim by Halbert as in right of his wife.

The case came before the Court on 13th February 1851, and an interlocutor was pronounced, finding that "the claim against the late Mrs Christian Lowther or Dickson for the fee of the said sum of £842 : 5 : 1⁵/₈, remained undischarged, but remit to the Lord Ordinary to hear parties fully on the question, whether the late Mrs Elizabeth Dickson or Halbert had a vested interest in that fee."

The Lord Ordinary (Robertson) found, "that the late Mrs Elizabeth Dickson or Halbert had no vested interest in the fee, or share of the residue bequeathed by the late Thomas Johnston, and to this extent sustains the defences and decerns, reserving all questions of expenses." His Lordship rested his opinion upon the decisions in the cases of *Pearson v. Cassamajor*, 16th December 1836, 15 S. 280; *Provan v. Provan*, 14th January 1840, 2 D. 298; *Johnston v. Johnston*, 9th June 1840, 2 D. 1038; he also referred to *Robertson v. Richardson*, 6th June 1843, 5 D. 1117; *Matthew v. Scott*, 21st February 1844; *Allardice v. Latour*, 31st January 1845, 7 D. 362; *Newton v. Thomson*, 27th January 1849, 11 D. 452.

Against this interlocutor the pursuer Halbert reclaimed.

Logan and H. Robertson, for the reclaimer.

Hector and Deas, for the respondent.

THE LORD PRESIDENT. The question here is as to the intention of the testator. There are some rules on this subject by which a testator's intention is presumed in law to be governed in making testamentary deeds in this way, and thus the question is narrowed, as the testator is held to have meant a certain thing, whether he really did so or not, unless he has made it clear that he did not. In the present case, what the testator did and what he desired to be done appears to me to be plain enough. He made over his property to his trustees, and he desired them to pay the interest to his niece during her life, and the capital to her children at her death. That was all that he did or said. The question is, whether, during the life of Mrs Dickson, the children had a vested interest and right of fee, so that they could transmit or transfer their shares of the capital in a way to take effect at the death of their mother.

Mar. 28. 1853. The testator has said nothing about that, and I do not see, in any part of the deed, any provision which can throw light on that. It is left to law, that is, to these rules I have referred to, which may be said to consist of the presence or absence of certain conditions of the bequest. For example, it is said that there is here no direct and distinct estate of life and fee, and that this shews that the trust was to subsist until the capital sum or share was paid to the children of the nephews and nieces named. Another circumstance, therefore, looked to, is the trust itself. A deed giving an ulterior interest to parties, or not giving it, is another of those elements, and a very important one, because, when there are such interests given to parties, and a trust exists, then that trust is presumed to be for carrying these objects into effect. Then, another thing has been talked of—where an interest is given to a *class* of individuals and not to the individuals *nominatim*. Some of the cases cited, and particularly the case of *Johnston*, dwelt on that element as important. For myself, I have never been much impressed with its importance. I think it is merely a short way of expressing a number of persons. Now, what have we here? (1.) We have a trust. That element exists. It is consistent with a suspending of the vesting, but not conclusive against it. (2.) There is no direct estate of life and fee given in express words. (3.) There is what is in substance and effect a distinguishing between the interest in the fund during the lifetime of the life-rentrix and at her death. The interest is to be paid to the testator's nephews and nieces during their lifetime, and at their death the capital sums to their children. (4.) No other person is alluded to who had or could have any other interest in this estate than the life-rentrix and her children. (5.) Then we have this fact, that the money is only to be paid at the death of the mother, but that has never been held of much importance in these questions. The view I take of this case is, that there are only two parties interested, viz., the mother for her life and the children for the fee. The trust was required for various purposes. But neither a trust nor a life interest necessarily, or by implication, exclude vesting; neither does postponement of payment. Then why should not this be held to vest? Unless it vested, predecease of all the children would have created intestacy—a result not to be presumed to have been the intention of the testator, especially in dealing with residue. My conclusion, therefore, is in favour of vesting; and that is borne out by the leading cases on this point. The case of *Maxwell v. Wylie*, 25th May 1837, is very instructive, especially the opinion of Lord Corehouse. Between some of the previous cases and the present, especially the case of *Forbes v. Luckie*, 24th Jan. 1838, 16 S. 374, I do not see any substantial distinction, and therefore, upon the whole, I think the fund here did vest in the children, and that the interlocutor requires to be altered.

LORD FULLERTON. I am of the same opinion. I think the interlocutor must be altered to do justice to these parties. Otherwise, the only object which the truster could be held to have had in view would be to create intestacy in a certain event—a result to be avoided in a matter of construction.

LORD CUNNINGHAME. I am sorry to differ from your Lordship. If I understand the ground on which the legacy in the present instance is held to have vested at the death of the testator, it is mainly on the authority of the case of

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Dickson.

Forbes and Luckie, 16 S., p. 374, 26th Jan. 1838, where a residue bequeathed Mar. 28. 1853. to a widow in *liferent* and her children in fee was held to vest in the latter at the death of the testator. That, however, was a very special case; in one event, pointed at in the report, the greater part of the residue was *divisible* during the widow's *liferent*, which had evidently great weight in the question of vesting. I consider *Luckie's* case quite insufficient for a question not characterised by the preceding specialty, to affect the series of later cases from *Provan and others*, in 1840, in the Second Division, to the late case of *Stewart*, 17th July 1851. There is, no doubt, some fluctuation in the decisions, from the variety of expressions used by different parties and conveyancers on bequest of provisions; but where a fund has been invested in trustees for behoof of a party in *liferent*, and of children or third parties in fee, it has hitherto been held that the fee did not vest till the death of the *liferenter*. It does not appear to me that the terms of the bequest on which the present question turns are so peculiar or unusual as to except it from the general rule. That rule also I conceive to be the best and safest for effectuating the probable intention of the truster. Where a fund is appropriated to a selected friend in *liferent*, and to children born or to be born in fee, it is generally meant that the fiars only alive at the ultimate period of *division* shall share the fund, and failing them the children; whereas, if vested at the *death* of the testator, a large part of the capital might often be carried off by distant collateral relations, unknown to the testator. Now, why should not the vesting of the capital sums take place here at the period of *division*, as generally implied in other cases? The custody of the funds by the trustees was necessary, till it should be ascertained (as usual) what fiars survived to take at each period of division. Was an infant who died a year after the truster to have a share because he survived the testator, and was another who died the year before the truster to be excluded? Though it is understood that there is some diversity on this point in English practice, our authorities, on a fair reading of them, sanction no such plea; and it is thought that the trust settlement in this, and in other cases of the kind, has been purposely so framed as to obviate these results.

LORD IVORY. I agree with the Lord President. When I look to the cases of *Forbes* and *Booth*, I think it is impossible to arrive at any other conclusion. The Court is not introducing any new subtlety into the previously known law, but following a precedent on all fours with the present question. The destination is to persons of a class, who, unless they are to be held to take at a particular time, would leave a part of the trust estate in the condition of intestacy—the last intention you are entitled to force on such a deed. But on looking to the present case, I do not see that there is really any difficulty as to what was the intention of this party, and therefore, I agree that this interlocutor must be altered.

The COURT “alter the interlocutor of the Lord Ordinary submitted to review; find that the pursuer's wife, the late Mrs Elizabeth Johnston Dickson or Halbert, had, from the date of the death of the testator Thomas Johnston, a vested interest in the fee of that share of Mr Johnson's residuary estate, of which he directed his trustees to pay the interest to his niece, Mrs Chris-

Mar. 28. 1858. *Halbert v. Dickson.* *tina Lowther or Dickson*, during her lifetime, and at her death the capital sum to her children; and to this extent repel the defences, reserving all questions of expenses; and the Lords remit to the Lord Ordinary to proceed in the cause as shall be just, with power to dispose of the question of expenses."

Hunter, Blair, and Cowan, W.S., Reclaimers's Agents.

William Martin, S.S.C., Respondent's Agent.

(J. S. M.)

No. 172.

M'KECHNIE v. DUKE OF MONTROSE.

1. *Forum Competens—Jurisdiction—Sequestration for Rent.*—A party having removed stock from a farm on which he alleged they were only placed to graze, and the landlord having brought them back as hypothecated to him, and placed them under sequestration:—*Held*, that the former must vindicate his right to them in the sequestration process, and that it was not competent for him to seek redress by personal action for restitution against the landlord in a different jurisdiction.

2. *Diligence—Warrant of concurrence—Hypothec of Landlord.*—*Held*, that a landlord is entitled *de recenti* to follow into another county and bring back to his farm effects carried off in fraud of his hypothec, on obtaining warrant of concurrence by the Sheriff of such county, indorsed upon a warrant "to carry back, inventory, and secure," granted by his own Sheriff in petition for sequestration.

1st Division.

Mar. 29. 1858.

M'Kechnie v. Duke of Montrose.

The Duke of Montrose presented, on 9th Dec. 1850, an application to the Sheriff of Dumbartonshire, for sequestration of the crop and stock of Macfarlane, his tenant in the farm of Wards in that county. It prayed specially, "as the said John Macfarlane has recently, chiefly under cloud of night, removed his stock, cattle, implements, and furniture from the said farm," for warrant to officers, &c., "to bring back to the said farm, and there to inventory and secure the stock," &c., "on the farm." The other conclusions were in usual form. The statement of facts narrated, that "the respondent has, during the week ending 7th Dec. current, under cloud of night, removed with his whole family, stock, furniture, and effects, from said lands, and has proceeded to Gartmore in Perthshire, leaving the said farm and lands deserted, and entirely displenished. The respondent has also sent away a lot of sheep that were on said farm of Wards, and the same are now in the keeping of John M'Kechnie, carter in Drymen, in Stirlingshire." The Sheriff, of the same date, appointed service and answers; and in the "meantime sequesters, and grants warrant to carry back, and inventory, and secure, as craved." On 10th Dec. this warrant was presented to, and warrant of concurrence granted by, the Sheriff of Stirling. M'Kechnie was no party to any of these proceedings. On 13th and 14th Dec. this warrant was executed, and ten sheep, which were admitted to have been on the farm of Wards till 3d Dec., were removed from M'Kechnie's premises in Stirlingshire, carried to Dumbartonshire, and sequestered as part of the stock of the farm of Wards.

The present case was the advocacy by M'Kechnie of an application by him to the Sheriff of Stirlingshire against the Duke, stating in substance that the ten sheep were M'Kechnie's property—that they had been merely sent to graze at Wards—that the grass-maill had been paid—that the sheep had been openly removed from Wards on the 3d Dec., and that Jolly, the Duke's factor, was aware of all these circumstances. The application concluded—"that the Sheriff should decern the defender to return and restore the ten sheep removed by him, and that to the premises from which they were taken."

Answers were lodged, in which the defender averred that he had always believed the sheep to be the property of the tenant of Wards, who was ostensible owner; and he pleaded as dilatory defences, (1st), that, "The sheep were, by the sequestration proceedings, made litigious therein, and the question, whether they are subject to the noble defender's hypothec can only there be legally discussed;" and (2d), "That the said sequestration excluded the competency of this process, more particularly as this process may bring the Courts of Stirlingshire and Dumbartonshire into collision, and may involve virtually a suspension by the Sheriff of Stirlingshire of a warrant granted by the Sheriff of Dumbartonshire in a competent process." The Sheriff-substitute "sustains the dilatory defences, and dismisses the action" with expenses. On appeal, the Sheriff-depute "affirms the interlocutor appealed from."

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Against these interlocutors M'Kechnie presented the present advocacy.

The Lord Ordinary, (Rutherford), "repels the reasons of advocacy, remits the cause *simpliciter* to the Sheriff, and decerns; Finds the respondent entitled to expenses," &c.

In a note his Lordship observed, "The present case does not involve a question of jurisdiction, nor has the defender put it, as the advocator would argue, upon that ground. The defender being resident in the county of Stirling, and the conclusions being of a personal nature, there is plainly jurisdiction. But in the circumstances, the proper *forum* for the remedy which the advocator demanded was the county of Dumbarton. There could be no doubt, it is apprehended, upon this point, if the sheep in question had been on the farm of Wards when they were attached and sequestered. In that state of the fact, it would have been a good answer to such an application, that the pursuer should claim before the Sheriff of Dumbartonshire in a process where both the other parties interested were present, the landlord and the tenant, for the tenant might have important interests in the property of the sheep, and a personal action would not have been sustained against a sequestering landlord to release from the sequestration, and to bring back the sheep which his diligence had attached. The cases referred to, *Scotland v. Laurie*, 12th June 1828; *Kincaid v. Love*, 19th Dec. 1835; and *Steele v. Smith*, 2d Feb. 1831, especially the concluding observations in Lord Corehouse's note, seem sufficiently to establish this point. But it was said that the sheep had been previously removed, and were improperly brought back. If they had been brought back by a warrant in itself illegal, or illegally executed, the answer might have been good. But no valid objection has been stated on either of these grounds. The shewing of the application justified the warrant by the Sheriff of Dumbarton, and the production of that warrant to the Sheriff of Stirling and his concurrence rendered legal its execution in that county. . . . The Lord Ordinary holds at common law that a warrant for the purpose of restoring property recently removed in fraud of legal right, may be executed in another county with concurrence of the Sheriff of that county. Without entering into any enquiry into the origin and nature of letters of supplement, it does not appear that any such procedure was necessary, or would have been competent in this case. The object was not to force the party to compare in a court which had no jurisdiction. It was a remedy to recover *vid facti* property which had been recently and fraudulently removed, having reference to

Mar. 29. 1858. the party from whose hands it had been removed, and not to the party in whose hands it might be. Such a warrant, and its execution *within the county*, are of ordinary occurrence; and to refuse redress by indorsation of a warrant competently granted in the first instance, would leave the wrong in a great measure without remedy. There is even authority for holding that the landlord might *viâ facti* reclaim property subject to hypothec, if his interposition were immediate, or during the course of removal. The advocator scarcely denying the competency of procedure, argued, that it could only be competent after service on the party in whose hands the goods were. It seems difficult to hold this view without defeating the law, for notice to the party against whom, as having the goods in possession, the warrant was to be executed, would probably be attended with their immediate removal. Besides, service would imply extension of jurisdiction, which could only be by letters of supplement, or under the statute;" (1 and 2 Vict., c. 114).

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The advocator reclaimed, for whom,—

Pyper, maintained that it is incompetent to recover hypothecated effects which have come into the hands of a third person, unless he be made a party to the application. The landlord ought, therefore, to have applied for restitution to the Sheriff of Stirlingshire, where M'Kechnie was domiciled, and where the sheep were settled; M'Laurin's Forms of Process, ii., p. 460; Ersk., ii., p. 6, § 60, and cases *ib. cit.* No judge ordinary can grant a warrant to be executed beyond his own jurisdiction, and such warrant cannot be bettered by being backed by another judge.

Monro, for the respondent.

The LORD PRESIDENT. Substantially I think the interlocutor right.

I. I do not mean to say that an application to the Sheriff of Stirling against a person resident within his jurisdiction to get restitution of property, is not *prima facie* best; but there may be circumstances stated in answer thereto shewing it to be inexpedient to allow it to proceed; assuming, as we must do, that each party is prepared to establish his averments, that answer here is, that the property was carried off by legal warrant as falling under sequestration in Dumbartonshire. It may be that these sheep were not properly embraced in that sequestration, but in the meantime they were, in virtue of the warrant, replaced on the lands and dealt with as under it, and that was their condition at the time of the application to the Sheriff of Stirlingshire. The process of sequestration is also one of repetition, for in it a party may demand that articles shall be withdrawn. Now the sheep having been replaced under the sequestration, M'Kechnie's proper course was to have gone to Dumbartonshire to vindicate them. Thus only could he have got rid of *nequs* laid on them in legal form, though whether rightly or wrongly is a different question. It was impossible for the Sheriff of Stirling to have proceeded in the application to him. But ought he not to have sisted procedure till the settlement of the question in the sequestration, rather than to have dismissed it altogether, as M'Kechnie might still have to present to him an application for restitution? This is a narrow point, but supposing such application necessary, it would proceed upon a different *species facti* from the present, which I, therefore, think was rightly dismissed.

. II. But then it is said, there was no legal warrant to carry off the sheep : it was a spuilzie : there was no law to authorise the backing of the warrant by the Sheriff of Stirling. This is a serious question ; but I think its being *prima facie* a warrant will solve the particular case before us. I have no doubt that there is a considerable practice of backing warrants of this kind, and I think it is sound in principle, for how can restitution of property improperly carried off be obtained in any other way ? Must you, as recommended in the books of practice, serve a petition on the party alleged to have the improper possession, and give him notice that you will wait upon him for restitution ? That would be a very ineffectual way. I consider this to be an act of a *magisterial* rather than of a *judicial* character. It would, in my view, be contrary to principle and dangerous in practice to hold this warrant illegal : but certainly, in this form of proceeding, we cannot assume it to be so.

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LORD FULLERTON. We must deal with this question on the footing of the Sheriff of Dumbartonshire's warrant being unimpeachable. It would be hazardous, and certainly contrary to practice, to hold that it was illegal to back this warrant. There are the strongest reasons of expediency in support of the practice.

LORD CUNINGHAME concurred.

LORD IVORY. I agree with the Lord Ordinary. We cannot take for granted that the sheep were the property of M'Kechnie, or that the sequestration has been unduly extended to them. This case is much founded on the merely technical objection that M'Kechnie having got the sheep settled upon his property stood in such a situation to the landlord as saved him from a demand for summary restitution. But what would have been said had these warrants been granted after the sheep had been actually inventoried in the sequestration and then carried away by M'Kechnie to his property ? There could be no doubt that they would have been perfectly legal and proper. Such procedure is founded on usage, and is part and parcel of the common law. If M'Kechnie had not settled his sheep in Stirlingshire, but had been carrying them away into another county, could the Sheriff through whose jurisdiction he was passing not stop him, and restore the sheep to the position they were in before matters were involved ? Now the *species facti* here does not make any difference in principle. Though the sheep were not under sequestration, yet they were hypothecated at the time of removal, and hypothecated subjects may be brought back *via facti* if this be done *de recenti*. Had the sheep been immediately followed and overtaken in Stirlingshire before they were settled, they could have been claimed without the interference of a magistrate at all. Here they had been settled on M'Kechnie's property, and a magistrate's warrant was obtained. The question comes in the end to this : Was the act of concurrence in such circumstances not equivalent to an original warrant by the Sheriff of Stirlingshire ? It is impossible to hold it was not. This is just one of those cases where law will interfere to reinstate matters, leaving all questions between the parties to be settled afterwards.

The COURT "refuse the prayer of the said reclaiming note, and adhere to the interlocutor of the Lord Ordinary : Find the respondents entitled to additional expenses," &c.

Alex. Hamilton, W.S., Advocator's Agent.

Dundas & Wilson, W.S., Respondent's Agents.

(J. S. M.)

No. 173.

RICHARDSON v. HARVEY.

Cautioner—Discharge of, by giving time.—1. A landlord having taken bill for rent from his tenant, which did not fall due till after the term of payment mentioned in the lease:—*Held*, (1.) That this was such a giving of time as discharged a cautioner for the rent, who was not made a party to the transaction; and (2.) That it made no difference that the tenant had become bankrupt before the term of payment in the lease.

2. Circumstances in which the Court (*dis. Lord Ivory*) held, that a landlord held his tenant's bill as an available document of debt.

1st Division.

Mar. 29. 1853.

Richardson
v. Harvey.

Harvey granted to Richardson the following letter of guarantee, dated 7th August 1849:—"On condition that you agree to allow Mr James Baird, tenant in your farm of Oldhall, to sell and remove his present crop and stocking, I hereby guarantee to you full and regular payment of the current year's rent of L.373, 5s., as it falls due at Martinmas and Whitsunday, with the interest due for drainage at these terms." Upon the 11th September thereafter, Richardson wrote thus to Baird:—"I find, on consulting my man of business, that a letter of guarantee for rent is liable to dispute, but is quite good for bills. I have, therefore, made a new letter as enclosed, and drawn two bills on you for the sum, which I will thank you to accept, and hand to me with Mr Harvey's signature to the new letter, which he will be so good as address to me with his own hand, and I will immediately return his former letter." No such new letter was ever granted, Richardson only receiving back from his tenant a bill for L.212 : 1 : 1, the amount of rent and interest on drainage money due at Whitsunday 1850, dated as on 7th August 1849, and payable on 28th May 1850. At a subsequent period he took his tenant's acceptance for the rent of Martinmas 1849, dated 8th January 1850, and payable one month thereafter. Various payments were from time to time made to him by Baird, expressly as in extinction of the latter bill, by which the arrears of Martinmas rent were reduced to L.11 : 14 : 7. On 4th March 1850 he wrote to Harvey, "For the half-year due at Whitsunday I hold Baird's bill due 28th May, and which you were so good as guarantee the payment of to," &c. Harvey understood this letter as implying that he had guaranteed the bill, and denied his liability. Richardson in consequence raised the present action against him, libelling on the letter of guarantee, and concluding for payment of L.223 : 15 : 8, as the amount of rent due by Baird, made up of the above sums of L.11 : 14 : 7, and L.212 : 1 : 1.

Baird had become bankrupt on 13th March 1850.

In defence, Harvey pleaded,—1. That by the new arrangements intimated in the letter of 11th September 1849, the letter of guarantee had been innovated and discharged: and 2. That he was liberated as cautioner by the landlord having taken bills, which postponed the terms of payment of rent beyond those mentioned in the lease, and thus gave the principal debtor time.

The Lord Ordinary (Cowan), after detailing the facts of the case as above stated,—“Finds that the taking of said bills was not part of the original transaction to which the defender was a party, and was without communication being had with the defender, and his concurrence thereto obtained: Finds that by taking said bills in manner foresaid, time was given to the principal debtor, having the legal effect of discharging the defender from his

obligation as cautioner under his said letter of guarantee: Therefore sus- Mar. 29. 1853
tains the defences, assoilzies the defender, finds him entitled to expenses," &c.

His Lordship observed in a note,—“That the time given the principal debtor was short, does not affect the principle upon which the decisions in this branch of the law appear to have proceeded; and it is not necessary where time has been given, that the cautioner be able to shew that he has suffered damage by the period of payment having been prolonged. . . . The transaction between the creditor and the principal debtor, without communication with him, entitles the cautioner to found on the time thereby given the debtor, as operating his immediate relief from the cautionary obligation.”

Richardson
v. Harvey.

The pursuer reclaimed; for whom—

Cloghorn argued, that there was nothing beyond a mere proposal for a new arrangement, which fell to the ground, and the bill for the Whitsunday rent along with it. In another view, the landlord by taking the two bills took only a corroborative security, in order to avail himself of summary diligence, in the event of the rent under the lease not being punctually paid. It was a right over and above his other rights and privileges, as to using which he tied up neither his own hands nor the cautioner's; *Bell's Prin. sec. 262*; *Goring v. Edmunds*, 1 *Bell's Illus. p. 190*. Neither release nor novation will be presumed in the absence of express stipulation, or by the mere taking further security, *Roy's Trustees v. Stalker*, 13th February 1850; *Cook v. Moffat*, 7th June 1827, *Journeymen Dyers*, *Hume*, p. 244; *Pitman on Principal and Surety*, p. 200; *Melville v. Glendinning*, 7 *Taunt.* 126; *Gordon v. Calvert*, 4 *Russ.* 586. At all events as to the Whitsunday rents, the principal having failed before that term, any delay granted to him could not liberate the cautioner; *Bell's Prin. sec. 259*.

Campbell and Neaves, supported the interlocutor. The creditor took both bills as a further security, payable at a future day, which implied *pactum de non petendo*, and so discharged the cautioner; *Chitty on Bills*, p. 409; *Hall v. Cole*, 4 *Adol. and Ell.* p. 577; for the obligation guaranteed was supplanted by a new one differing from it in an essential point, viz., the date of fulfilment; See Lord Gifford's observations in *Thomson v. Bank of Scotland*, 11th June 1814, 2 *Shaw App.* p. 347; *Fell on Guarantees*, p. 161; *Rees v. Berrington*, 2 *Vesey, Jr.*, 542; *Howell v. Jones*, 4 *Tyrwhitt*, 548.

THE LORD PRESIDENT. I think the interlocutor well founded. We must keep in view the broad principle, that when a party has become a guarantee for a debt payable specifically at a given time, (especially if it be a debt in regard to which the creditor has certain peculiar rights and privileges against the original debtor), if the creditor give time without the cautioner's concurrence, this liberates the cautioner, because it is an alteration of contract. Can we truly apply this principle here? I had my doubts whether the landlord had received and retained the bill for the Whitsunday rent on the footing of making use of it, or whether he had not just held it as part of a transaction which had fallen to the ground. These doubts are now removed. I think it plain that the landlord never contemplated, in writing his letter of 11th September 1849, an abandonment of his original guarantee, except on getting a new one. It is equally clear that he never did receive the new letter, but only a bill for the Whitsunday rent, dated as on 7th August. Had

Mar. 29. 1858. the question rested here, it might be doubtful whether he could be held to have taken this bill. But then he goes and gets a bill for his Martinmas rent. This was clearly an alteration of the guarantee as to that rent; and it is proved that this bill was acted on. The guarantee was thus extinguished as to the Martinmas rent; which has an important bearing upon the next question, viz., was the bill for the Whitsunday rent also taken with the intention of being acted on? I think it was, and that the letter to Harvey of 4th March clearly shews this. The guarantee was therefore extinguished as to the Whitsunday rent. Time was given in regard to both rents, probably inadvertently, but still behind the back of the cautioner. The landlord was not entitled to abandon the bill on his tenant becoming bankrupt before Whitsunday; and so to place himself in the same position as if he had never taken it. He could not do so, having once held by it as a bargain.

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v. Harvey.

LORD FULLERTON. I am of the same opinion. The party who takes a bill payable as this one is, must be held to have so taken it that the tenant might have the benefit of the prolongation of time. We cannot presume that the landlord got for nothing the advantages of a bill.

LORD CUNINGHAME concurred.

LORD IVORY. I hesitate as to the soundness of your Lordships' judgment. I think that this creditor never intended to abandon his letter of guarantee, and that he is still entitled to insist against the cautioner. The defender's case is, that the transaction of 11th September discharged him. But when I look at the letter of that date, I think that in that transaction Richardson did not intend to depart from the guarantee, but to hold it on until he got a different one substituted in its place. Had he got this new guarantee and delivered up the old one, no question could have arisen; but he never did relinquish possession of the old guarantee. He got only one bill, of which he made no use by discounting it or otherwise; it lay idle by him till recovered out of his hands, and was only once mentioned in the correspondence, viz., in the letter of 4th March, which I do not think sufficiently proves intention to use it. Here, therefore, we want that which is necessary to support the equities in favour of a cautioner who pleads release in consequence of the creditor having entered into a new contract with the debtor; for I hold that the transaction of 11th September was never understood to have been carried out, and I can see no trace of its having been afterwards carried into effect in any different shape. On the contrary, I hold that the original guarantee was all along relied on as subsisting, and that the debtor never thought he had any right to demand delivery of it. If Richardson had sued his tenant for the Whitsunday rent under the lease, I do not think the latter could have alleged the bill as giving him time, for the landlord had this reply, "I only got it on the footing that you were to procure Harvey's guarantee for its payment. This you failed to do, so that transaction fell." I think this a good answer to the tenant, and, if so, a good answer to the cautioner.

The COURT "refuse the prayer of the reclaiming note, and adhere to the interlocutor of the Lord Ordinary: Find the defender entitled to additional expenses," &c.

Rolland and Thomson, W.S., Pursuer's Agent.

Campbell and Smith, S.S.C., Defender's Agents.

(J. S. M.)

CARRUTHERS v. THE CALEDONIAN RAILWAY COMPANY. No. 174.

Process—Summons—Penal conclusions—Relevancy—Railway Clauses Consolidation Act, sec. 47.—Held, that an action for penalties under a railway statute is not a civil action of the nature of an ordinary action for debt or damages, but is of a penal nature, and so is to be dealt with according to the strictest rules of pleading. *Circumstances in which a summons concluding for statutory penalties was held to be not relevantly or properly set forth.*

This was an action at the instance of John Carruthers, Esquire, of Breckon- 1st Division.
hill against the Caledonian Railway Company, concluding for £5000, as Mar 29. 1853.
“the amount of the penalty incurred” by the railway company, “or other-
wise of the sum of £1000 sterling,” as the amount of damages sustained by Carruthers v.
him through the want of accommodation roads as substitutes for accesses de- Cal. Rail Co.
stroyed by the railway company, under the following circumstances narrated
in the summons. The libel set forth that the line of the Caledonian Railway
passes through the pursuer’s property, and that for the value of the land re-
quired for the formation of the line, the pursuer had made an agreement with
the company, and received from them £750. It then narrates: “That as the
line of railway crossed the said lands of Breckonhill in a particular direction,
it cut off two roads and accesses which the pursuer had for the use of his
cattle in going to water, and for various agricultural purposes. . . . That
the company erected a bridge on the south part of the farm for the pursuer’s
accommodation; but this bridge was suddenly removed on or about the 4th
of June last, 1847; . . . and since then, the pursuer has been wholly
deprived of his said accesses, and has been put to great inconvenience, and
has sustained much damage and loss from the want of water, and from having
to go by the parish road, which is a considerable distance from the south part
of the farm, for watering his cattle, and for the agricultural management of
that part of the farm lying on the east side of the railway: That in the con-
veyance which the pursuer granted to the company, as before mentioned, he
reserved “claim for all accesses, water, water courses, watering-places, gates,
fences, and damage:” That, by the 47th section of the Railways Clauses
Consolidation Act, of 21st July 1845, it is enacted:—‘If the company do not
cause another sufficient road to be so made, before they interfere with any
such existing road, as aforesaid, they shall forfeit twenty pounds for every day
during which such substituted road shall not be made, after the existing road
shall have been interrupted; and such penalty shall be paid to the trustees,
commissioners, surveyor, or other person having the management of such road,
if a public road, and shall be applied for the purposes thereof; or, in case of
a private road, the same shall be paid to the owners thereof; and every such
penalty shall be recovered, with costs, by action in any competent Court:’
That the Caledonian Railway Company did not substitute any road for the
pursuer’s accommodation, in place of the two roads already referred to; and,
therefore, they have incurred the penalty of £20 per day since the 4th of June
1847: That the two accommodation roads, of which the pursuer has been
deprived by the said company for the purposes of the railway, have been ac-
commodation roads for the use of the pursuer’s farm for time immemorial;
and, in consequence of being deprived of the said roads, the pursuer has sus-

Mar. 29. 1853. Carruthers v. Cal. Rail. Co. tained loss and damage to the amount of £1000 sterling;" and that the defenders refuse to satisfy his claim or to make it the subject of arbitration.

To this summons defences were lodged, pleading *inter alia*, that the summons is not specifically and relevantly libelled to support a claim for penalties, or *separatim* to infer an alternative claim for damages. The grounds of complaint libelled, resolve not into a failure to substitute a road for another road which has been cut off or shut up, (to which alone the penalty sued for would be applicable) but into an alleged failure to furnish a bridge or passage across the railway, the claim for which can only be determined, or made effectual before the Sheriff or Justices, under sections 60 and 61 of the Railways Clauses Act.

A record was made up, and the Lord Ordinary (Ivory) made great avizandum with the cause to their Lordships of the First Division.

Penney, and the *Dean of Faculty*, for the pursuer. An action for penalties under a statute such as this is, in the proper sense of the word, a civil action, —in reality is an action for a statutory debt. *Campbell v. Young*, 24th Feb. 1835, S. 13, p. 535; *Phillips v. Steele*, 12th Jan. 1847, 9 D., 318. The summons is sufficiently explicit. The statute applies to the case of every road whatever. The terms of section 46 apply to every case where the company shall "cross, cut through, raise, sink, or use *any* part of *any* road, whether carriage-road, horse-road, tram-road, or railway, *either public or private*." If the company gave or pretended to give a substitute, and immediately thereafter took the substitute away, the case would be exactly the same as if no substitute had been given at all. The pursuer does not admit that the bridge was a sufficient substitute for his roads, or that he ever consented to take it as such.

Patton, and *Deas*, for the defenders. This action must be considered as of the nature of a criminal process, and the penalties sued for to bear the character of punishment, and therefore all the rules applicable to criminal proceedings must be enforced. The summons does not set forth all the clauses applicable to the matter in question, nor does it sufficiently state the precise character of the roads taken away. The offence charged may be a most detrimental act, but it is not that for which the penalty of section 47 is enacted.

THE LORD PRESIDENT. This is a double action for damages at common law, and for penalties under the railway statutes. We are now to deal with the statutory part of the case, and with that only. Now, it was remarked that this is not a criminal indictment, and is not to be dealt with strictly and critically as such. That is true. On the other hand, it is a case of a penal character, and therefore, it is to be strictly dealt with. It is true that it does not go to the infliction of corporal pains and punishment, but it does go to the infliction of a serious penal pecuniary mulct, and therefore it is a case in which a greater degree of strictness in regard to the framing the libel which sets forth the transgression,—for it is a transgression,—is to be applied than in the case of an ordinary summons for debt or damages. It is possible that this summons may be strictly enough framed to support its common law conclusion, although not so to support the statutory conclusion. Now, the question is,

has it been framed with reference to the statutory conclusion with that accuracy necessary to support it? It is said that the summons may be framed in general terms, and may be made more specific by condescendence. That is a general rule in ordinary actions relative to pecuniary rights or the like. I am not prepared to say, that in the case of penalties a summons may not be made more clear and specific in the condescendence. But when we are dealing with a matter of penalty, the defender must be brought into Court on a logical statement of his having transgressed the law, and being liable in the consequences. I think the present summons does not do this. The thing that is dealt with here is an operation to be performed upon a road. The existing road must be interfered with in a certain way, by crossing it, cutting through it, raising or sinking it. It is not that the party is to be excluded from access to the road. That may happen without dealing with the road at all. The party may have access through his fields to a road which is important for him, and the railway may cut such access off. But that is not a case under the statute which deals with the actual operating on a road; and, accordingly, what the railway company are required to do is this, that before the commencement of any such operation, they shall make a sufficient road instead of the road to be so interfered with. I do not think the statute reaches the case of a footpath; but I am not prepared to say that it does not reach the case of a road of another kind constructed for the purpose of driving cattle to market or to water, constructed, it may be, as carefully as any statute labour road, or even more so. But there must be a road, and that must be interfered with by the operation on it so as to make it dangerous. If the railway company do so operate on the road, they shall make at their own expense a sufficient road in its stead. Now this is the main part of the statute, and it is failing to do that that draws after it the consequences set forth in § 47; that section without § 46 is nothing at all. I think, in order to make a relevant and proper statement here, it must be set forth that the railway company did cross, cut through, &c., part of a road, so described as to be plainly within the protection of this statute. It is necessary to set forth, that before the commencement of their operations they did not make a substitute road: and it is also necessary to state when it was that they did so interfere with the existing road without making a substitute road, and also when this state of matters ceased, if it has ceased at all. Now, looking to the summons, we have no positive statement that the roads were operated upon. We have it stated that the removal of this bridge deprived the pursuer of his access, but we have no statement when it was that the railway company commenced their operations; therefore we have no statement of the time at which they contravened the statute. Farther than that, they erected a bridge, and as I understand that statement, while that bridge existed this party had accommodation tantamount to what he had by the road. The inference, therefore, is, that the railway company did make a substitute road; the next thing is, that the *gravamen*, the offence consists in taking down that bridge. That is an operation on the substitute road, and I do not know that that is a case to which the penalty applies. It might be a question whether the company might be called on to repair a substitute road; but it does not follow that they would be liable in the penal consequences of the

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Mar. 29. 1853. Carruthers v. Cal. Rail. Co. statute if they did not do so; therefore there is no statement of the time when the original road was interfered with, nor is it stated how long that state of matters continued. The road referred to here is stated to be for the use of the pursuer's cattle. That leaves the thing equivocal. We do not see that it is such a road as the statute contemplates. A road made for cattle would be under the statute, but a cart-track through the fields would not be so, and all these things are important. When the case comes to be laid on the words of the statute, we ought to have had reference to § 46, for the statement is not logical without it. Section 46 is the governing section; therefore, I think altogether this summons is not constructed with that accuracy and logical precision which it is important to observe in cases of penalties, and penalties so heavy as here occur. No looseness can be allowed. The summons should be laid so as it could stand of itself without a condescendence, and, therefore, I am for holding that so far as the summons is laid on the statute it is not relevantly or properly set forth.

LORD FULLERTON. I am of the same opinion. The question here is as to penalties. In that point of view it is not easy to conceive a more highly penal case, for if the claim is well founded, the penalties are going on; and I must say, that I cannot receive this summons as complying with the requisites of such a case. I do not think that this is a road in the meaning of the statute at all.

LORD CUNINGHAME. I concur.

LORD IVORY. I am of the same opinion. This is unquestionably a penal action in the proper sense of the term. It is a penalty *in poena*. It is a penalty *per diem*, for not doing something, and if it is incurred, the Court has no power over it. That being so, and the amount of the claim here made being so extreme, I think that when the party comes into Court on so small a ground of complaint as here, and claims such damages, he is going very much on his *summum jus*, and he cannot complain if he is kept within the strictest bounds of pleading.

The COURT, therefore, "find that the summons in this case is not sufficiently and relevantly laid on the statute referred to, (8 and 9 Vict., cap. 33), and, therefore, dismiss the action in so far as it relates to the statutory penalties concluded for, and find the pursuer liable for the expenses applicable to this part of the discussion: . . . *Quoad ultra*, remit to the Lord Ordinary to proceed further in the cause as shall be just," &c.

William Martin, S.S.C., Pursuer's Agent.

Hope, Oliphant, and Mackay, W.S., Defenders' Agents. (J. S. M.)

Railway Shares—Broker—Proof.—A sharebroker who held certain railway shares bought for a party on his order, carried them over on a Tuesday at a certain loss per share, alleging that he had received verbal orders on that day so to do, and held them on till they fell very much in value. The party denied that he gave any such orders, alleged that he had ordered them to be sold off on the preceding Saturday, and refused to have anything farther to do with the shares. On a proof, *Held*, that the order to sell off on Saturday was not proved, and that, although there was no evidence of an order to carry over on

Tuesday, the shares still remained at the risk of the party, and the broker was not responsible for the loss on the shares, but could make no charge for the expense of the carrying over.

This was an action for payment of L.257, 10s., the alleged balance due to 1st Division. the pursuer, a sharebroker, on an account current with the defender, who had Mar. 31. 1853. employed him to buy certain railway shares. The defence was that the pursuer had failed to obey the instructions of the defender with reference to the disposal of the stock, and had kept it on till it became very much depreciated in value; and that, in the circumstances, the loss must fall on the pursuer. Hope v. Lyon.

The Lord Ordinary decreed in terms of the libel, deducting the expense of the last of a series of operations in "turning over" the stock, which he held had not been authorised by the defender.

The defender reclaimed, and the parties not consenting that the case should be dealt with as a concluded case, the Court allowed a proof of their respective averments.

It appeared that on Wednesday, 7th July 1847, the pursuer sent a note to the defender, requesting instructions as to the disposal of the stock, which, some time before, had been bought at L.4, 8s. per share. The defender wrote "91s. or upwards," in pencil, on the note, and sent it back to the pursuer. It was admitted that this was an order to sell at L.4, 11s. per share, or upwards.

The defender averred, that on the Saturday following, he ordered the pursuer to sell off the stock. There was no evidence in writing of this order; but a clerk of the defender deponed that he heard the order given to a messenger sent by the pursuer to the defender on that day, while the messenger deponed that the orders were "to carry over at 1s. per share." On the evening of this Saturday, the pursuer wrote, "I regret I could not sell at cost, or carry over at 1s. I trust better success on Monday." On Wednesday, the pursuer intimated that he had turned the shares over at 1s. 6d. per share. On Thursday, the defender wrote, "I am determined to stand by my Saturday's order; my order was to sell. I am determined now to take none of the shares. I have no farther dealings. Please send in my account, with full particulars, as it runs till next Saturday." The pursuer replied on the same day, alleging that the Saturday's order was not to sell at a sacrifice, but to carry over at 1s.—that he had met the defender on the Tuesday the 13th, and had then received orders to carry over at 1s. 6d., which he had accordingly done. The pursuer did not dispose of the shares, and they fell very much in value.

In this state of the proof,—

Shand, for the reclaimer (defender), argued—Positive orders were given by the defender on the Saturday to sell out. The pursuer failed to do this, and must stand the consequences. Even supposing no such order was proved, the pursuer puts his case on orders given by the defender on the Tuesday following. This order is denied, and no proof of it has even been attempted. The pursuer, by this operation, took the stock into his own hands, and must bear the loss.

Young, contra. So far from the defender having given orders to sell out on the Saturday, it is clearly proved that his intentions were to turn the stock

Mar. 81. 1853. over on that day at 1s. The pursuer could not accomplish this, and he wrote the defender that he could not do so. It may be that he has not proved authority for what he did on the following Wednesday, but he is ready to strike the charge out of his account, as the Lord Ordinary has done.

The LORD PRESIDENT. To me this appears a very clear case. I throw every thing else out of view except what took place on the Saturday. The evidence of the messenger, to my mind, is better testimony than that of the defender's clerk, and it is corroborated by the pursuer's letter on Saturday, which was not answered. I therefore think the defender has not proved his order to sell out on that day.

LORD IVORY. The proof was allowed in this case, as I see from my former notes, chiefly because the defender alleged he had ordered the stock to be disposed of on the Saturday. On a review of the evidence, parole and documentary, and the observations of counsel upon the case, I am of opinion that he has failed to do this, and I therefore think the Lord Ordinary's interlocutor must be adhered to.

The other Judges concurred.

The COURT therefore adhered, with additional expenses.

J. F. Wilkie, S.S.C., Agent for Pursuer.

J. A. Robertson, S.S.C., Agent for Defender.

(R. S.)

No. 176.

MARDER'S TRUSTEES v. DOUGLAS AND OTHERS.

Parent and child—Trust—Settlement—Apportionment—Illusory division.—By mutual trust-disposition executed by a husband and wife, it was declared competent to the husband to alter the division of the trust-estate amongst their children as therein provided for, and to divide the same amongst them in such shares and proportions as he should think proper. Two daughters survived their parents. During the wife's lifetime the husband executed a deed which proceeded without the wife's consent, and by which he left £50 to the eldest daughter who was married, and the whole residue amounting to upwards of £4,500 to the youngest, who was unmarried:—*Held*, that the share given to the eldest daughter was not illusory; and *observed*, that the Court will be jealous of interfering in such cases, unless the apportionment be such as to be clearly a breach of the power committed to the parent.

1st Division.

Mar. 81. 1853. This was a multiplepinding raised in name of the trustees of the late Henry and Mrs Marder, against Mrs Robertson Marder or Douglas, and Miss Marder their daughters, and also against the husband of Mrs Douglas for his interest, with a view to a distribution of the trust-estate. By a trust-disposition executed by Mr and Mrs Marder, after nominating trustees and providing for payment of their estate after their death to their children in equal shares, it was declared competent to Mr Marder "by any deed that might be executed by me, to divide the said sums and increase thereof among my said children, and order the same to be paid to them after my death, and the death of my said wife, in such shares and proportions as I shall think proper." Mrs Marder died in 1832, and Mr Marder in 1849. Mrs Douglas and Miss Marder are their only children. At the time of Mr Marder's death he was possessed of heritable and moveable property to the extent and value of upwards of £4500. By deed of division executed while his wife was alive, but which proceeds without his wife's consent or concurrence, Marder directed the trustees under the trust-disposition, after the death of the longest liver of him and his wife, "to pay any balance of annual rent which may be due at

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the time, as well as the foresaid principal or capital fund itself, as follows:—^{Mar. 31. 1853.}
 viz. £50 sterling thereof to Mrs Helen Robertson Marder or Douglas, my ^{Marder's} eldest daughter, and the remainder, whatever the same may be, to Margaret ^{Trustees v.} Kirkpatrick Marder, my youngest daughter, but always with and under the ^{Douglas, &c.} provisions and declarations contained in said trust-disposition." Mrs Douglas now claimed to be preferred to one just and equal half of the balance of the annual rent and proceeds of the trust-funds due at her father's death, and of the capital or trust-fund now remaining, pleading that the trust-settlement so provided for her, and that the deed of division executed by her father did not recal or affect her right to the half of the trust-funds vested in her by the trust-disposition.

Miss Marder claimed to be preferred to the whole fund *in medio*, after deducting the sum of £50 provided to her sister by the deed of division, with interest thereon.

The Lord Ordinary, (Rutherford), "with reference to the cases of *Seivwright*, 27th January 1824, and *Marjoribanks*, 17th February 1837, and the opinions expressed by several of the consulted Judges in the case of *Crawcour and Spens v. Graham and Others*, 3d February 1844, reports this case to the Lords of the First Division of the Court," &c., and, in a note, his Lordship stated, that he had "reported this case, because it seems to raise very purely for decision the extent of a parent's right of apportionment. The share given to the eldest daughter is here all but illusory: nor are there alleged extraneous circumstances sufficient of themselves to support the exercise of the power."

Pattison, for Mrs Douglas. There is here a most unexceptionable vesting of the fee in the children, subject, no doubt, to the power in their father, given him in the trust-settlement. The question is, whether this is a valid and effectual exercise of that power which the Court will give effect to? *Skene*, 8th December 1826; *Kemp v. Kemp*, 1795, 5 Vesey, Jr., 849; *Vanderzee*, 4 Vesey, Jr., 770. This is an illusory division and ought to be set aside.

Neaves, with whom *Monro*, for Miss Marder.

The LORD PRESIDENT. I do not know what is the rule of the law of England in regard to such matters. We have a mixed law, and we are in use to consider that we could set aside an unequal distribution of funds if it be illusory or not an honest exercise of a parent's power. But I apprehend that when the power of apportionment exists, it should be made very clear to us that in the exercise of that power there has been that improper proceeding which really had for its object to defeat the interest of the party under the deed. That might be inferred in certain cases from the sum bequeathed, as where one party gets a shilling and another the whole residue. But where there is only a diversity of sums to rest on as here, we require to be very careful how we interfere. We have no statement as to the state of the affairs of Mrs Douglas's husband: but the presumption is, that the husband can support his wife. There are none of those circumstances here that give the case that ugly appearance to which we could give effect. Aversion is not alleged. We are not in use to sit in judgment on the reasons for a parent making an unequal apportionment. It must be made to appear that it was

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done to defeat the interest of the party complaining of it. Besides, a reference to various circumstances might possibly make it very plain that what was here apparently an unequal division was not really so. But it is not necessary for the party upholding the deed to go into that. It is for the party impeaching the deed to shew that there has been an unfair division. That has not been shewn here, and, therefore, I am for upholding the claim of the younger daughter.

LORD FULLERTON. This is one of the most disagreeable cases which can come before the Court. Where there is no test but that of their own private experience it is unpleasant for the Court to be driven to decide,—the duty of the Court being to decide rules of law. I must say, that looking to the whole circumstances of the case, this is as near being an illusory division as can well be conceived: but £50 is a sum not to be despised altogether, and, therefore, it is not very easy to say it is entirely illusory. No doubt you must consider what is the gross sum, and this is a very small sum as a share of the division, but, upon the whole, I am not disposed to differ from your Lordship's opinion.

LORD CUNINGHAME. I am of opinion that no relevant grounds have been stated for rescinding or refusing effect to the division made by the father of the fund in dispute. There is no authority in our books for holding that a division by a father, under a proper power, was ever challengeable in Scotland on the ground of illusory performance and gross inequality. But in later times, since the passing of the Act 1830, (11 Geo. IV. and 1 Will. IV. cap. 46), expressly abrogating challenges for illusory divisions in England, that law, if not directly applicable to Scotland, which has not been discussed, affords a strong rule for judicial decisions in our equity cases. I understand this view to have been sanctioned in the case of *Crawcour*; and it applies equally to the present case. On general grounds, it would be highly inexpedient and indecorous to compel a father to assign reasons to a court of law to justify and support any appropriation that he made among his own children, of a specific fund placed at his disposal.

LORD IVORY. I have arrived at the same conclusion. This would be the very last thing for the Court to interfere with. The parents have left the matter to the discretion of one of themselves. I am unwilling to say that that is tantamount to leaving it to the discretion of the Court, who ought to have no discretion at all in the matter, and ought only to see that there is no breach of the trust, but not to interfere as to the sufficiency of the division that is made. I am not prepared to say that when a father has two children, one of them married, and therefore secured of the means of living, presumably, and the other in pupillarity, and not so provided for, and probably to be left by herself without any protector, that he is not performing his duty, much less guilty of fraud in so providing for the unmarried daughter as he has here done. The Court never can have knowledge of the circumstances which operate and ought to operate on the mind of a parent; and the law ought not to be jealous of the actings of a parent, unless circumstances come to shew that his actings have been outrageous. Upon the whole matter, I do not think this comes up to the point when it is necessary for the Court, and when the Court would be warranted in interfering.

The Court, therefore, “sist William Smith, the husband of the claimant,

late Miss K. Marder, now Mrs Smith, as a party to this action, for his interest : Rank and prefer the said Mrs Smith, and her said husband for his interest, to the amount of her claim, under the deduction therein stated ; repel the claim for Mrs Douglas, except to the extent of £50, as admitted in the claim for Mrs Smith ; find no expenses due to either party, and remit to the Lord Ordinary to proceed farther as shall be just." Mar. 31. 1853.
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William Alexander, W.S., Agent for Nominal Raiser and for Claimant, Miss Marden.
Adam Paterson, W.S., Agent for Claimant, Mrs Douglas. (J. S. M.)

FERGUSON AND OTHERS v. MARJORIBANKS.

No. 177.

Will—Foreign deed—Construction—lex domicilii—lex rei sitae.—A will was executed in Jamaica creating a trust for educational purposes in Scotland, and with that view appointing as trustees certain parties resident in Scotland, "their heirs and assigns:"—*Held*, in a question as to who were to take under the deed as trustees, and which depended on whether the expression "heirs and assigns" applied to all the trustees or solely to the last surviving trustee, that the law of Scotland, where the trust was to be executed, and not the law of the truster's domicile, must regulate the interpretation of the truster's presumed intention in the matter.

The question which here arose was, whether the law of England or the law of Scotland should determine who were the parties entitled to act as trustees under a will executed by the late John Newlands of Jamaica. 1st Division.
April 1. 1853.

After giving various legacies to his relations in different parts of Scotland, Mr Newlands bequeathes generally the residue of his estate to "Alexander Marjoribanks of Balbairdie, William Innes of Cathlaw, Andrew Gillon of Wall-house, Wardrop of Cult, Baillie of Polkemmet, all of the county of Linlithgow aforesaid, Esquires, their heirs and assigns, for ever ; nevertheless upon trust," that they should invest the same in some public or private fund upon good and sufficient security, with full power to call in and reinvest, "as they shall think fit, so as the best annual interest may be made thereof, and to receive and take the annual interest or produce thereof for and during the term of ten years after my decease, in trust, to place out the same annually in like manner, so that the interest may become a principal sum ; and at the end and expiration of such term of ten years, then, that my said trustees, their heirs or assigns, or the major part of them, do pay and apply the annual interest of the whole of such principal money in the erection of a Free School in such part of the said parish of Bathgate as the major part of them shall think fit and proper, for the education of the youth of the said parish—such school to be under such management, government, and direction, and to be carried on and conducted in such manner as to my said trustees, their heirs or assigns, or the major part of them, shall seem best," &c. The testator then states it to be his will, "that the annual interest only may be so applied ; and it is my farther will and desire that the minister of the said parish of Bathgate, for the time being, shall be one of the trustees for the purpose of this my will." He finally nominates and appoints certain other persons, all resident in Jamaica, to be his executors. His will is dated the 8th of July 1799, and he died a few days afterwards. Under this will, certain proceedings took place in the Court of Chancery in Jamaica, and afterwards on appeal before the Privy Council. The parties to those proceedings were the trustees for the Scotch trust, with the exception of Innes of Cathlaw, and

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April 1. 1858. Wardrop of Cult—no one being found to correspond with these designations—the executors, and the representatives of an executor deceased, the heir-at-law, and the next of kin. It was ultimately adjudged by the Privy Council—adopting and giving effect to a report of the Court of Common Pleas, before whom they had appointed the case to be argued—that the rents, profits, interests, and produce of the real as well as the personal estate of the testator, for ten years from his decease, belonged to the trustees for the charitable purposes of the will; but that the real estate so subject descended to the testator's heir-at-law, and that the personal estate, under a similar burden, descended to the testator's executors at his death.

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In the result of those proceedings, a sum of above £14,500 was paid over to the Scotch trustees for the Bathgate school, who in 1833 bought ground, and erected a School-house and other buildings.

The pursuers, the provost and magistrates of the burgh of barony of Bathgate, and others resident within the parish of Bathgate, and heads of families, brought the present action against Mr Marjoribanks of Marjoribanks, the heir of Marjoribanks of Balbairdie, who is stated to have been the last survivor of the originally named trustees, Mr Gillon of Wallhouse, Sir William Baillie of Polkemmet, and his *curator bonis*, and the present minister of the parish of Bathgate. The summons, after stating the proceedings above referred to under Mr Newlands' will, that the sum had been paid over to the trustees individually named, and to the minister of the parish at the time—sets forth that Mr Newlands died domiciled in Jamaica, where he executed his will according to the English form—that, by the law of England, the character of sole trustee under the will had vested in the last survivor of the named trustees, being Alexander Marjoribanks of Balbairdie, and now belonged to his heir only, exclusive of the heirs and representatives of the other named trustees—that Mr Marjoribanks, the defender, in respect of his bankruptcy and insolvency, and of his being principally resident abroad, was disqualified from acting, either alone or conjointly with others, as trustee of the said school, and that a failure of trustees had thus taken place—and concludes, 1st, for decree of declarator of the pursuers' title to insist in the action; 2d, that the heirs and executors of the trustees who predeceased Marjoribanks of Balbairdie have no right to act as trustees, and that the defender Marjoribanks is the sole trustee; 3d, that he is disqualified from acting, and that in consequence "it is competent for our said Lords to nominate and appoint such and so many persons as to them shall appear fit and proper for the administration of the said school, and of the funds left and bequeathed for the support of the same, in all time coming." The other conclusions of the libel were all consequent upon those leading conclusions. There was no conclusion directly applicable to the defender the present minister of the parish of Bathgate, nor was his case treated of in the record.

Defences were lodged, maintaining generally, that the conclusion that the defender Marjoribanks is the sole trustee is groundless, in respect all the other three trustees are legal trustees according to the law of Scotland, and even supposing that the will is to be construed by the law of England, both the defender Marjoribanks, and the defender Mr Byers, as minister of the parish of Bathgate, are at present legal and qualified trustees.

The Lord Ordinary (Rutherford), "sustains the pursuer's title; but, on the merits, sustains the defences as regards the other conclusions of the libel; April 1. 1858.

. . . Finds the defender entitled to expenses," &c.

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banks.

In a note his Lordship stated that "the title of the pursuers is hardly brought into question. . . . But a more important question has been raised—the pursuers contending that the law of England, or rather, they should say, the law of Jamaica, under which the validity of the will and the amount of the bequest to the trustees were necessarily tried, must also determine the parties, whether trustees or beneficiaries, who are to take under that bequest.

. . . . They maintain broadly, that the law of Jamaica was to regulate the parties who were to take under the deed, whether as trustees or as beneficiaries; and, in particular, that it must interpret the expression "heirs and assigns," and determine whether those words applied to all the trustees whensoever deceasing, or solely to the last surviving trustee. The Lord Ordinary cannot assent to those views.

The domicile of the trust, so to speak, the place of its performance, is Scotland—the object of the trust is the establishment of a free school for the youth of the parish of Bathgate—the trustees who are to receive and apply the funds which the testator had devoted to that purpose were all of them Scotch trustees, named, too, in respect of their possessing property in that parish—and the minister of the parish for the time being is added to their number. Payment of the bequest has actually been made to the Scotch trustees, and the investment of the funds partly in heritable property in Scotland, joined with the residence of the trustees in Scotland, leaves with the Scotch Courts the only direct jurisdiction of remedy or otherwise. It is difficult to conceive any trust originating in a foreign bequest to be more entirely or essentially Scotch; and it is almost needless to add, that, in any view which can be taken of the matter, the character of the trust in this respect must be held to have been in the immediate contemplation of the testator. He made it, and intended it to be, a Scotch trust, to be executed exclusively in Scotland.

It was conceded at the debate, that there could be no propriety or relevancy in appealing to English law, or in refusing the direct jurisdiction of the Scotch law in regard to any question of ordinary administration, such as the propriety or impropriety of an investment, or the constitution of the school, and the arrangements for teaching. . . . Founding, therefore, upon the circumstance that the trust is essentially Scotch, and placed immediately under the jurisdiction of this Court, the Lord Ordinary conceives that the Scotch law is not only competent, but alone competent, to determine who shall be trustees. Had any dispute arisen in the Jamaica proceedings on this head, he conceives the law of Scotland must have been referred to. The right of the parties then claiming was admitted, and the question now raised regards the succession to the trust.

The Lord Ordinary is the more confirmed in this view from two circumstances—one, that the deed, especially as regards the constitution of the Scotch trust, is expressed in apt terms of the Scotch law, and that it is not necessary for the Scotch Courts to refer to English law to give a meaning to those terms, so that the Court is not driven to go elsewhere for the explanation of words which are not immediately intelligible. The other is, that the

April 1. 1858. construction which would be put upon it by the Scotch law, seems to coincide with what is the plain intention of the testator—the Scotch law, applying the words “their heirs” to all the trustees respectively and severally, would continue the trust in the same form, and with the same safeguards as the testator gave it in its original constitution, holding it to enure to the heir of Polkemet, and the heir of Wallhouse, who, as inheritors of those estates, must have the same interest in the administration of the trust with the trustees personally called by the testator.

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The circumstance that he names the minister of the parish for the time being as a trustee, as well as the various provisions for the majority acting, which applies in special terms, not to the trustees merely originally called, but to the trustees, their heirs and assigns, necessarily infer that the testator contemplated the trust being administered by the heirs of the original trustees in succession, and that nothing was further from his view than the result contended for by the pursuers—the devolution, namely, of the trust upon one party only.”

. . . His Lordship referred to the *Provost, Bailies, &c., of Edinburgh v. Aubery*, Ambler's Reports, vol. i., p. 286; the *Attorney General v. Lapine*, 22d June 1818, Swanston's Reports, vol. ii., p. 181; *Emery v. Hill*, February 1826, Russel's Reports, vol. i., p. 112.

“With reference to these authorities, and the cases there referred to, the Lord Ordinary thinks that the law of England, upon this international question, might be quoted for holding that, with respect to everything regarding the execution and administration of the trust, it would refer to the law of the place where, for the benefit of the place, the trust is to be constituted and performed, and the Courts of which alone can exercise the jurisdiction necessary for its due administration.”

Against this interlocutor the pursuers reclaimed.

The *Dean of Faculty*, with whom *Logan*, for the reclaimers. This is a matter not of administration, but of constitution. The *lex locae sitae*, governs the administration, the *lex domicilii*, the constitution of the will. The whole question is—what is the presumed intention of the testator? And with regard to the interpretation of an instrument of this kind, there is no exception to the rule that the law of the domicile must be looked to for ascertaining what is the property conveyed, and who are the parties who are to take it. Here the intention of the testator must be held to be that the heir of the last survivor is to be the sole trustee, and to exclude the rest.

G. G. Bell, with whom *Young*, were for the respondents.

THE LORD PRESIDENT. This case raises a point of considerable nicety; and I have felt a good deal of difficulty about it, and still do so. I was very much disposed to go along with the argument of the Dean of Faculty, when I first heard it put. The deed which we are interpreting is undoubtedly a Jamaica or an English deed, and in anything we do at present, we are not entitled to assume that the English law is otherwise than is put by the pursuer, that is to say—that if this deed came to be interpreted in England, it would be construed in the way contended for by the pursuer. But the question that we have to determine is—whether we are to refer to English law or not. The trust seems to me to consist of two parts. There are certain

parties that are to receive payment of this bequest, and then there is subse- April 1. 1853.
quently the government and constitution of this school. Now, assuming that
in regard to the first part, the parties who would receive this fund and in-
terest in the first instance, in the event of failure of certain of the persons
named, would be the heir of the last survivor, that does not necessarily solve
the question as to who are to be the parties to have the government of the
school afterwards. The money is to be paid and applied to the erection of a
free school in the parish of Bathgate, and such school is to be after that in the
government and direction, and to be carried on and conducted in such man-
ner as to my said trustees, their heirs or assigns, or the major part of them,
shall seem best, and the minister for the time being is to be one of the trustee-
tees. Now, I confess the leaning of my opinion, though it is with some diffi-
culty that I have arrived at the conclusion, is, that with regard to all that
latter part of the trust, and with regard to any question arising after the
money is invested and the trust constituted, the law of Scotland is to regu-
late it. The law of Scotland will certainly regulate the question as to the
heirs of the last survivor. There is a great deal in the remark, that assuming
the trust to vest in Marjoribanks as sole trustee, it would certainly be a strange
result, if, while his eldest son succeeded to the estate in this country, in re-
spect of possessing which, Marjoribanks was named trustee, his whole family
as heirs should have been called to the trust upon his death, if the law of the
testator's domicile had made his whole property equally divisible among his
children. Therefore, if we are not to go to the law of Jamaica for the inter-
pretation of who are heirs, we are not to go to it for the interpretation of who
are assigns, and therefore I come to the same conclusion with the Lord Ordinary.

LORD FULLERTON. I am of the same opinion. I had at first very great
difficulty, and certainly was a good deal moved by the argument of the Dean
of Faculty; but on considering the case maturely, I have come to be of opinion
that the Lord Ordinary's view is a sound one, and that it would be most haz-
ardous to vary it on grounds which would possibly lead to consequences which
we are not prepared for. This is a trust of a peculiar kind. It is a trust in
which the locality is fixed beyond dispute in Scotland, and which therefore
from its very nature, must be subject to the jurisdiction of the Scotch Courts.
That being so, it takes it out of the rule applicable to English wills—a class
of cases to which we are most accustomed. An English will applies only to
moveables which have no local situation at all. The fixing down of the trust
to a particular locality raises the presumption that the truster had in view
the particular rule which holds in the country where the locality of the trust
is fixed; and therefore in that view of the case we must hold that the law of
Scotland is the law which must be administered by the Court, as the truster
must be presumed to have made himself acquainted with it. What might have
been the case, had the question arisen before the money was made over, and
while some of the trustees had died, I do not know. That would have been
a different matter. If I were solving it according to the strict principles of
international law, I would hold that the Courts of England would have been
bound to decide it according to the law of Scotland; and although it only
happens now, the same rule applies; but I do not think it necessary to go
into this. The safest ground to take is that taken by the Lord Ordinary.

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LORD CUNNINGHAME. The present case appears to me to be a case of great and general importance. The dispersion of the sons of Scotland over distant lands is proverbial; and there have been many liberal and pious natives who have prospered in foreign countries, and have earlier and later left funds in trust for charitable and educational purposes, to parishes in most of the counties of the kingdom. The singular plea now set up by the pursuers, I believe for the first time, would probably affect the constitution and right working of these valuable institutions. Surely, they ought not to be put to hazard, except on clear and urgent grounds. I do not think these have been made out in the present case. The pursuers say that in English practice a devise to the incumbent of a parish *for the time being*, means only the functionary in office at the first vesting of the trust,—and that a trust to five Scotch heritors, and their “heirs and assignees,” gives a right of exclusion and monopoly to the heir of *the last survivor only*. I can find no such doctrine in any English books. I am disposed however, to think that we have little to regret from the want of this explanation by authors, from the opinion of a distinguished lawyer, (Sir John Romilly), recently laid before this Court in the case of *Thomson*, 18th Dec. 1851. The doctrine there laid down, I think, equally rules the present case.

LORD IVORY. I am of the same opinion. This is a case which turns on a branch of the law where I believe we may get authority for almost every conclusion to which anybody may wish to arrive. I am not altogether satisfied with the steps by which we have arrived at the same conclusion with the Lord Ordinary; but I do not see my way to any better conclusion, and therefore upon the whole, I agree. The question ultimately comes to this, what was the intention of the trustor? The reason why the law of England is not to apply, is this, that this is a mixed instrument in which the law of Scotland is brought forward. It is not a simple instrument of distribution, but one that contemplates the administration of a permanent trust within Scotland. Therefore upon the whole, I think the conclusion to which the Lord Ordinary has arrived is the sound one.

The COURT therefore, “refuse the prayer of the reclaiming note, and adhere to the interlocutor of the Lord Ordinary reclaimed against, find the defender entitled to expenses,” &c.

Wotherspoon & Mack, S.S.C., Pursuers' Agents.

Walter Horsburgh, W.S., Defender's Agent.

(J. S. M.)

No. 178.

BLACK v. CULLEN.

Sale—Railway Shares—Relief—Process—Summons—Relevancy.—Circumstances in which a summons was held not to afford relevant matter for issue in an action at the instance of a seller of railway shares against the alleged purchaser, for relief of calls made on him through the defender's failure to register the transfer.

1st Division.

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This was an action by the seller of railway shares against the alleged purchaser, concluding for relief of calls, for payment of which an action had been brought against the seller, on account of the purchaser's failure to register the transfer. The question before the Court, was the relevancy of the summons, and its sufficiency to support the issue proposed by the defender.

The summons set forth: "That on the 6th day of November 1847, the pursuer, (who is an accountant and sharebroker in Glasgow,) sold to Hector Howie Munro, secretary of the Glasgow Stock Exchange, fifty shares, of £25 each, of the stock of the Great Northern Railway Company, . . . upon which certain calls had been previously paid, amounting together to £8 upon each share, and that at the price of £2, 8s. a share: That the pursuer was informed that the said Hector Howie Munro made the purchase of the said shares by desire of Archibald Kerr, writer and sharebroker in Glasgow, a member of the said Stock Exchange, as broker for and on account of the defender: That on the same 6th day of November, the said Archibald Kerr and J. Irvine, a clerk of the defender's, and who was employed by the defender to act for him in this matter, brought to the pursuer a transfer of the said shares which had been prepared by the defender or others acting for him, which they tendered to the pursuer for his signature; and the pursuer having at the same time been paid the stipulated price of the said shares by Mr Kerr or Mr Irvine, he accordingly subscribed the said transfer, and delivered the same, with the stock certificates of the said shares, to the said J. Irvine, for the defender, that the transfer might be completed by the defender's subscription thereto as a party, and the blanks which had been left therein filled up, and that it might thereafter be duly registered in the books of the said railway company, in terms of law: That by the said transfer, the pursuer assigned and transferred to the said defender the said fifty shares, . . . and the said defender thereby agreed to accept and take the said shares, subject to the said orders, restrictions, and conditions; That the pursuer afterwards learned that the defender had accordingly executed the said transfer: That he failed, however, to get it registered in the books of the said railway company, as he ought to have done, although repeatedly required to do so by the pursuer: That in consequence of this failure, the said Great Northern Railway Company continue to hold the pursuer liable to them for the calls payable to them, in respect of the said shares, since the date of the said transfer: That a summons has now been raised against the present pursuer, as the holder of the said fifty shares of the said company, concluding for payment of calls on these shares amounting to £250: That for the reasons before stated, the defender is liable to free and relieve the pursuer of the payment of the foresaid sums concluded for in the said summons, and of the whole consequences of that action: And concluding that the defender should be decerned and ordained to free and relieve the pursuer of his liability to the Great Northern Railway Company for the sums concluded for in their summons."

Defences were lodged by Cullen, denying that he had ever had any transaction with the pursuer directly or indirectly; and referring to a correspondence which had passed between himself and Kerr as shewing, that although he had given Kerr instructions to purchase shares for him on 15th October, these instructions had not been implemented. He pleaded, *inter alia*, that the summons was irrelevant, as it did not libel on any purchase by the defender from the pursuer. That, in point of fact, the shares mentioned in the summons were not the same which had been purchased by the defender: that there had been a call on Great Northern shares on 3d November, and as this call had not been paid by the pursuer, he was not in a condition to execute

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April 1. 1853. a legal or effectual transfer of the shares in terms of the Companies Clauses Consolidation Act, 8 Vict., c. 16, § 16.

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The case came before the Court on 21st January 1851 on a reclaiming note against an interlocutor of the Lord Ordinary, (Ivory), finding for the defender, and the following interlocutor was pronounced: "Recal the interlocutor submitted to review, and find that the summons contains relevant matter, and remit to the Lord Ordinary to proceed further as he shall see cause."

On the case being returned to the Outer House, an issue was proposed by the pursuer, and the Lord Ordinary made avizandum with the issue and whole cause to the Court.

On 13th June 1851, the Court "approve of the issue as now adjusted and settled."

Against these interlocutors the defender appealed; and, on 17th December 1852, the case was remitted back to the Court of Session, "with instructions to recal the interlocutors complained of in the said appeal, and to hear and decide the cause on the pleadings and documents in process, with the following mutual admissions made by the said parties by their counsel as aforesaid, that is to say,—That on the 6th November 1847, the appellant sent his clerk, John Irvine, from Edinburgh to Glasgow to Archibald Kerr with the letter of that date, . . . and £446, being the price of 180 shares of the Great Northern Railway, which the appellant, by his letter dated the 14th October 1847, . . . had instructed Kerr to buy, and which Kerr, by letters dated the 15th October 1847, and relative purchase note, . . . represented that he had bought. On the 6th November Kerr waited on the respondent with the document . . . which had been already signed by Lindsay, and the respondent having executed the same, received from Kerr £120, being £2, 8s. per share for 50 shares, and, in exchange, delivered to Kerr the said document, with the relative certificates for the £50 shares, as therein mentioned: The said document so handed over by the respondent to Kerr, was, with the exception of the appellant's signature thereto, in the state in which the document, . . . now appears. The said document . . . so executed by Lindsay and the respondent was given by Kerr to Irvine, along with the letter . . . addressed to the appellant, and was on the same 6th of November, brought by Irvine to Edinburgh, and delivered to the appellant, who immediately subscribed his name to the said document.

It does not appear that any communication was ever made by Kerr to the appellant that any purchase of shares in the Great Northern Railway had been made by Kerr on behalf of the appellant, except the purchase stated by Kerr's letters of 15th October 1847: That instructions were given by the appellant to Kerr by letter . . . for the purchase of 180 Great Northern Railway shares, and that number of shares was actually bought by Kerr for the appellant on the 15th October 1847: That the extracts . . . are true extracts from the books of Kerr, Munro, and Cullen respectively: That on the 3d day of November 1847, three days before the said document . . . (the transfer) was executed, a call of £2, 10s. per share had been made on the shares by the Great Northern Railway Company. The first application on the subject of the aforesaid shares by the respondent

to the appellant personally, was made by letter of the 2d of October 1848. ^{April 1. 1853.}
 . . . And also with power to the said Court to deal with and decide all ques- Black v.
 tions of expenses between the parties in the said cause, including the costs of Cullen.
 the present appeal."

The transfer is as follows:—"I, William Lindsay of Edinburgh, Esquire, in consideration of the sum of £ paid to me by John Cullen, Esquire, of York Place, Edinburgh, writer to the signet, do hereby assign and transfer to the said John Cullen, one hundred and thirty shares, numbered, &c. And I, Alexander Black of Glasgow, accountant, in consideration of the sum of £ paid to me by the said John Cullen, do hereby assign and transfer to the said John Cullen, fifty shares, . . . of and in the undertaking called the Great Northern Railway Company, to hold unto the said John Cullen, his executors, administrators, and assigns, subject to the several orders, restrictions, and conditions, on which we held the same immediately before the execution hereof. And I, the said John Cullen, do hereby agree to accept and take the said shares, subject to the orders, restrictions, and conditions aforesaid. As witness our hands and seals the sixth day of November, in the year of our Lord one thousand eight hundred and forty-seven."

The case now came before the Court on a petition at the instance of Cullen to apply the judgment.

Buchanan, Neaves, and Penney, for Cullen.

Macfarlane, and the Dean of Faculty, for Black.

The LORD PRESIDENT. By the terms of the judgment remitting the case we are compelled to hear and decide the cause on the documents in process, with the mutual admissions of the parties. Whatever may be our cravings for further light, we are not permitted by the judgment to indulge them. Some of the facts set forth in the summons are not within the state of admissions sent from the House of Lords. According to the admission, Irvine went with £446 for Kerr, as the price of the 180 shares that had been purchased on 15th October. Now, from the admissions, and the documents referred to in them, it is clear (1,) that Kerr was employed for the purchase of that number of shares for Cullen on 14th October; (2,) it is equally clear that he did purchase them, also that he did intimate that he had purchased them. From various letters and extracts from the books of the parties, it appears that these shares were purchased from parties other than Black, and not at the price of £2, 8s. but at various prices, the average of which may have been £2, 8s. Now then, that was the fulfilment by Kerr of the authority he had obtained from Cullen. Then Cullen sent his clerk with the money to fulfil that contract, and it does not appear from the admissions what the clerk did with it, but it is to be inferred that he did give it to Kerr. At this date of the 6th November is the first appearance of Black in this transaction, and he comes here as the party who sold on the 6th November, and therefore as the party who sold *not* the shares that had been purchased by Kerr for Cullen, nor the shares which Cullen sent money to pay for, but a transaction made after the money had been sent for the shares purchased on the 15th October. It farther appears that there was a purchase on the 6th November from Black. It is not said whether these were the identical shares purchased for Cullen or

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no. It would appear then from this that Kerr did not implement in terms and literally the transaction which Cullen had authorized him to implement, and which he had to a certain extent implemented; because the literal implementation of it would have been to have obtained transfers from the parties named in the letter of advice of 15th October, as the parties from whom he had purchased, and to have paid these parties, and to have transmitted that transfer to Cullen. But Kerr acting on his own authority, and assuming that he was doing the best for Cullen, the money having come for the shares, he on that day, the 6th of November, buys them from Black, and takes a transfer from Black and Lindsay to Cullen. I think it is quite clear that if Cullen had gone to Glasgow himself, and that if he had found that Kerr had not yet purchased the shares on that 15th October, that it was perfectly competent for him to say, I shall have nothing to do with Black or anybody else; and so have declined going on with the transaction. It was quite open to him on the morning of the 6th November to have said that. Now did the thing that took place on that day amount to a purchase for Cullen from Black? Irvine was not sent to make the purchase. But Kerr made a purchase from Black, and took a transfer to Cullen, and the question is, whether that does amount to a sale which obliges Cullen to relieve Black of the calls on these shares. Now it was certainly a curious proceeding on the part of Cullen to sign that transfer, and lay it past in his desk, and also the scrip certificates; for the transfer shewed who were the parties to the transaction. He makes no objection to it, and his explanation of it is, that Kerr did not tell him that it was a purchase of the 6th of November, that he believed it to be the fulfilment of the transaction of the 15th October, from which he could not resile, and that Kerr did on the 6th November what he had no authority to do at all. I think that raises a serious question between Cullen and Kerr. The question comes to be how far that affects Black? He says, he knows nothing of all these previous transactions. A broker came to him, he sold the shares, signed the transfer, got his money, and heard no more about it. It may be that although unauthorized, the purchase was adopted by Cullen. Was it so adopted as to bring the case within the scope of this summons? That raises a very nice question. To adopt a purchase or transaction of this kind implies knowledge of all the material circumstances connected with the transaction, and the kind of thing purchased. Now, the fact that he was a free man upon the 6th November, and was not implementing a bargain to which he was tied down as at that date, is a matter as regards Cullen, of some importance, though Black might not have been privy to it. Now, it is material whether he was deceived about it,—whether he was made to believe that the transfer was delivered in fulfilment of a transaction from which he could not resile. Even if matters had remained in all respects the same as they were on 14th October, and that Cullen could have said nothing on 6th November, but I have now changed my mind, the question would be, whether that was a material state of matters. He says that there had occurred a circumstance which made it important, for that a call was made at a time inconvenient for him to meet. That was a material fact, which, if Cullen had known of it, would have been held a sufficient reason for him saying to Kerr, I will not go into the market, and will not take the shares purchased this morning; for

it does not appear that any knowledge or information of that call had been made to Cullen at all. Here certainly was a great dereliction of duty on the part of Kerr. It is a material fact in the question of adoption of these shares that Cullen should know that they were shares that had not been purchased till that morning, and that they were shares subject to that call at the time they were so purchased, and that he was paying for them the price which he was to have paid for shares when the period of any call was an uncertainty. The question comes to be, whether the silence of Cullen for so long a period amounts to adoption of these shares? I confess that I have great difficulty in arriving at this conclusion, especially in this shape of the action. There were material facts which should have been communicated to Cullen, and any adoption was in ignorance of the facts connected with the unauthorized purchase. I am of opinion, therefore, that the circumstances do not make out that the purchase was authorized, and that the circumstances do not amount to adoption by Cullen.

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LORD FULLERTON. I have always been so much in favour of Black and so confident in my opinion, that I am afraid I have overlooked some consideration of importance. It has always appeared to me that the justice of the case and the law lay with Black the pursuer, and that the whole difficulty arose from a sort of juggle between Kerr and Cullen, both of whom were very considerably in the wrong, but for which Black was not in the least degree responsible. On the 15th October, it turns out that Cullen gave orders to Kerr to purchase shares, and Kerr wrote that he had purchased shares. No doubt it is true that Kerr writes that he got all these shares on the 15th October, but if he did so, it is quite clear that he did not keep them, or deliver them to Cullen, for what he did deliver was the transfer of the shares sold by Black. Now Cullen having this document before him, signs it, and so, I think, he does homologate the sale, such as it was, from Black. It is in vain to say in a case of this kind that the shares are so individualized that there is any hardship in your not getting the identical ones you expected, if you get others of exactly the same value. Here the transfer bears the names of the parties from whom the shares were bought. Now, how can it be said that Cullen thought that when he was signing that note he was signing a note applicable to shares purchased on the 15th October? I think there is enough to justify us in holding that Black was not in the wrong, but that the parties in the wrong were Cullen and Kerr. I never had any difficulty as to the justice of this case; Kerr may have been in the wrong in not telling Cullen that he had parted with the shares on the 15th October, but does that put Black in the wrong? Is it possible to contend that after all that took place Cullen confirmed the sale in ignorance and by mistake? There is no evidence of this, but the reverse, for he kept the transfer beside him for more than a year without any objection.

LORD CUNINGHAME. I agree with the Lord President. By the admissions now recorded, it is established that the defender Cullen, only authorised his clerk and Kerr to get the transfer of shares completed *which had been purchased under the authority of 14th October*, that the shares libelled on were not of that number, and there is no evidence as to what passed between Kerr and the pursuer on 6th November relating to the transference of these shares.

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It is clear that if Kerr told Black that he was authorised by Cullen to buy new shares on 6th November, he stated what was not true, and what he had no authority from Cullen to represent. In that view, the pursuer must be answerable for Kerr's wrong, to which Cullen was not accessory; and, therefore, I am for assoilzieing the defender.

LORD IVORY. I feel myself compelled to agree with the majority of the Court. I have a strong impression that this is not in favour of the justice of the case, but I do not see my way to any other conclusion.

The following interlocutor was pronounced: "The Lords in further pursuance of the remit from the House of Lords, having considered the pleadings and documents in process, with the mutual admissions of the parties referred to in the remit, . . . Find that the grounds of action libelled are not sufficiently established: and, therefore, assoilzie the defender from the whole conclusions of the summons, and decern; but find no expenses due."

Campbell & Smith, S.S.C., Pursuer's Agents.

John Cullen, W.S., Defender's Agent.

(J. S. M.)

No. 179.

BALLINTEN v. CONNON.

2d Division.

April 1. 1853.

Decided

Jan. 18. 1853.

Leave to Appeal.—Where a judgment of the Court substantially disposed of the merits of a case, but there remained certain minor points still undecided, the Court refused leave to appeal.

Ballinten v.
Connon.

SUSPENSION AND INTERDICT, CONNON v. BALLINTEN.

Decided

Jan. 26. 1853.

Process—Process-Caption—Interdict—Competency.—The certificate of registry of a vessel having been produced in an action of reduction for the purpose of satisfying the production, and the agent of the depositors having insisted on the process being returned, in order to borrow up the certificate of registry, for the purpose of enabling the vessel to sail during the dependence of a discussion whether the arrestment of the vessel had been regularly loosed, the pursuers applied for a suspension of the process-caption, and a suspension and interdict against the clerks lending up the certificate, except for the purposes of the process, on a receipt adapted to the circumstances:—*Held*, that this was a competent proceeding.

REDUCTION, CONNON v. BALLINTEN.

Decided

Jan. 26. 1853.

Process—Amendment of Libel—Repeating a Summons—Form of Issues under Acts 1621, 1696, and in cases of fraud at common law.—An omission having been made in a summons of reduction, founded on the Act 1696, to state that the defender was a prior creditor, or an alleged prior creditor; but the record having been closed without any notice of this objection, which was only taken at the final advising, the Court refused to allow an amendment of the libel, but allowed the pursuers to repeat a summons of reduction founded on the Act 1696. Terms of Issues approved of for trying a reduction founded on the Acts 1696, 1621, and on fraud at common law.

"It having been found by a judgment of the Second Division of the Court, dated 1st December 1852, that the said William Leask was rendered bankrupt on or about the 19th day of December 1846; and it being admitted that his estates were sequestrated on or about the 12th day of January 1847; that the pursuer Richard Connon is trustee on the said sequestrated estate; that the vendition of the ship "True Blue" of Aberdeen, No. 8 of the original process of reduction at the instance of the said Richard Connon, trustee fore-said, bears to be dated on the 11th day of December 1846; that it was regis-

tered at Aberdeen on or about the 28th day of December 1846, and indorsed April 1. 1853. upon the ship's certificate of registry on or about the 19th day of January 1847; that the said deceased John Ballinten was the grandfather of Margaret Ballinten or Leask, the wife of the said William Leask; and that the pursuers are now pursuing for reduction of the said vendition under the Statutes 1696, c. 5, and 1621, c. 18, and at common law :—

I. Whether the said vendition was granted by the said William Leask at or after the time when he became bankrupt, or within 60 days before, in favour of a creditor, the said John Ballinten, without any proper and instant consideration, or for his satisfaction or further security of a prior debt, in preference to other creditors of the said William Leask?

II. Whether the said vendition was granted by the said William Leask to the said John Ballinten, the grandfather of his said wife, a conjunct and confident person, without true, just, and necessary cause, and to the hurt and prejudice of prior creditors of the said William Leask?

III. Whether the said vendition was granted by the said William Leask in favour of the said John Ballinten fraudulently, to disappoint the legal rights of his creditors?"

Deas and Shand, for the pursuer.

The *Lord-Advocate (Moncreiff)*, *Dean of Faculty (Ingles)*, and *Logan*, for the defenders.

Shand and Farquhar, W.S., Pursuer's Agents.

James Marshall, S.S.C., Defender's Agent.

(R. S.)

LINDSAY v. HAY (MORGAN'S SUCCESSION).

No. 180.

Process—Petitions for Service—Multiplepinding—Contingency—Issues.—Where there are various claimants in different degrees of propinquity, the Court will order the party claiming the nearest degree to go first to trial.

Mr James Morgan, alleging himself to be both heir in heritage, and executor 2d Division. of the late James Morgan, Esq. of Coates Crescent, Edinburgh, presented a April 1. 1853. petition to the Sheriff of Chancery, for service for establishing his character of heir, and also lodged a claim in a process of multiplepinding which had been raised by Mr Donald Lindsay the judicial factor on Mr Morgan's estate, which was of very great value, with a view to its distribution. This petition of service, along with three other competing petitions, were advocated, and remitted by Lord Cowan to Lord Anderson, before whom the process of multiplepinding depended. That process embraced both the heritable and moveable property of the deceased, the latter portion being far the more valuable, amounting to nearly L.100,000. The record was closed, and issues were lodged in both processes for trying the propinquity of the different claimants.

At this stage of the proceedings Mr Alexander Morgan, stating himself to be the elder brother of James Morgan, appeared, and craved to be sisted as a party to the multiplepinding. According to his own account, he had been absent in America for many years, and had not heard of the death of Mr John Morgan, and the institution of the legal proceedings consequent thereon, till too late to enter appearance before the record in the multiplepinding was closed. James Morgan admitted the statements made by Alexander Morgan,

April 1. 1853. and a joint minute was given in by these parties, narrating the change of
Decided circumstances caused by the appearance of Alexander Morgan, and was ad-
Feb. 23. 1853. mitted by the Lord Ordinary to form part of the record in the multiplepoin-
Lindsay v. ing. In the meantime Alexander Morgan had presented a petition for ser-
Hay. vice to the Sheriff of Chancery, the induciæ of which had not expired.

The Lord Ordinary having been moved to proceed with the adjustment of the issues, pronounced an interlocutor in these terms :—" Having heard counsel, on the motion of Alexander Morgan, to proceed with the adjustment of the issues, supersedes consideration thereof in the meantime, until the relative proceedings for trying the propinquity of the said Alexander Morgan are farther advanced."

Alexander and James Morgan reclaimed.

Shand, with whom *Deas*, for reclaimers. The motion before the Lord Ordinary was made both for Alexander and James Morgan, though the interlocutor bears that Alexander was the only party to it. Indeed, it could not have been otherwise, as draft missives were lodged for both these parties, and the moveable estate now falling to James is so much more valuable than the heritage, and both are contained in this multiplepoining. It is an action quite complete in itself for disposing of all questions among the parties. There is no necessity for waiting for Alexander Morgan's petition coming forward, before adjusting the issues. It will be advocated *ob contingentiam* as soon as the days of intimation are expired.

Neaves, *Dean of Faculty*, *Robertson*, and *Currie*, contra. It is plain the Lord Ordinary understood that the motion was made on behalf of Alexander Morgan alone, and so the interlocutor bears. This is truly a competition of briefes (to use the old term for such a proceeding); and is it competent to go on and try such a question while one of the briefes is not even in this Court? Such a proceeding would be unprecedented. Till we see this new petition, we do not know in what character Alexander Morgan claims, whether as heir of line or conquest, and that may be here a question of great importance, so far as some of the other competitors are concerned.

LORD JUSTICE-CLERK. It is plain the motion must have been made for both the Morgans. Any thing else would not have been intelligible or suitable to the position of parties and of the case. Now, it appears to me that there is no reason whatever for delay. All parties and all the estate, whether heritable or moveable, are in the process of multiplepoining which is before us, without waiting for the new petition. It will be enough to adjust the issue for the Morgans, for, as in the case of *Watson* in 1837, as they claim a nearer degree of propinquity than any of the other parties, their claim will be first tried; and if they succeed in any character, that will most probably put an end to the case.

The other Judges concurred.

Shand and Farquhar, W.S., Agents for Messrs Morgan.

Graham Binny, W.S., Agent for Messrs Morris.

Adam and Kirk, W.S., Agents for Peter Wanless and others.

William Duncan, S.S.C., Agent for Isabella Brymer and others. (R. S.)

PETITION, JOHN EDWARD GEILS OF DUMBUCK.

No. 181.

Lands Clauses Act—Consigned Money—Petition to uplift and apply—Heir of Entail—Preparation of Discharge—Vacation.—In an application by an heir of entail for warrant to uplift and apply price of land consigned by a railway company, the drafts of the discharges approved of by the Court, and warrant granted to uplift and apply on discharges being produced and delivered, the same being approved of by the Lord Ordinary on the Bills, in time of vacation, as duly executed conform to the drafts.

On 19th July 1852, the petitioner Mr Geils, as the heir in possession of the 1st Division. entailed estate of Dumbuck, presented the present application for authority to uplift the sum of £4567, consigned by the Caledonian and Dumbartonshire Junction Railway Company, as compensation for part of the estate taken for the purposes of the railway, and to apply the same in payment of certain entailer's debts affecting the fee of the estate, and particularly specified in the petition.

April 1. 1853.
Decided 4.
Mar. 1853.

Petition Geils.

The application was founded upon the 1st, 67th, 68th, and 79th sections of the Lands Clauses Consolidation (Scotland) Act. And after the ordinary procedure, the Court on 4th February 1853 found that the consigned fund might be applied in paying the debts mentioned in the petition, but without interest on one of the debts, and *quoad ultra* granted the prayer of the petition, and remitted to the Junior Lord Ordinary to see the discharges executed and recorded.

The petitioner thereupon gave notice to certain of the creditors that their debts would be paid up under this application at the following term of Whitsunday 1853.

On 4th March 1853, Lord Curriehill, Ordinary, reported verbally that drafts of the discharges of the debts which required to be paid at Whitsunday had been lodged in process, revised by the agents of the respective creditors, and that he was satisfied of the accuracy of these drafts. But as the creditor in one of the debts resided abroad, it was impossible to get the deed of discharge of that debt executed and produced in process and approved of before the rising of the Court this month, and the Court did not sit at Whitsunday. That, therefore, the petitioner desired to have the requisite warrants for payment pronounced this session, if competent to be carried into effect, on production of discharges duly executed in terms of the said drafts; and if considered necessary, on the deeds being certified as conform to the drafts by a competent party to be named by the Court or the Lord Ordinary.

Bailie, for the petitioner, supported the petition.

The Court pronounced the following interlocutor :—"The Lords, on the report of Lord Curriehill, Ordinary, approve of the draft of the discharges, Nos. 34 and 35 of process, and grant warrant on the British Linen Company, for payment out of the consigned sum of £4567, and interest thereof, of the sums following, viz., 1st, To Archibald Cuthbertson and Henry David Hill, trustees of the deceased John Anderson, of the sum of £4000, in payment of the debt to that amount due to them, and to Mrs Cecilia Susannah Forbes or Mostyn, of the sum of £452 to the account of the debt of £1200 due to her—discharges of the said sums, approved of by the Lord Ordinary on the

April 1. 1853. Bills, as in terms of the said drafts, being produced to the bank, and left in
Decided 4. their hands to be delivered by them to the reporter Mr Campbell, and by him
Mar. 1853. placed on record at the expense of the petitioner, reserving his relief from
Petition Geils. such expense against any party liable thereto; and, 2d, to the petitioner for
his own behoof of the interest which has accrued or may accrue on the said
consigned sum, and grant warrant on the Accountant of Court, or other custo-
dier of the deposit receipt, to exhibit the same to the bank in order that the
said payments may be marked thereon, and decern and allow decree to go out
ad interim, and remit to the Lord Ordinary on the Bills in time of vacation,
with authority to ascertain the correctness of the discharges as executed, and
if correct, to approve of the same, and remit back to Lord Curriehill to pro-
ceed further in the case as shall be just.

Christopher Douglas, W.S., Petitioner's Agent.

(J. S. M.)

No. 182.

JAMES AND JOHN MORGAN v. MORRIS AND OTHERS.

Process—Issues—Written Interrogatories.—Where aged and infirm witnesses have been examined on commission, before issues for the trial of the case have been adjusted, such witnesses must be examined *de novo*, on written interrogations, after issues are adjusted, their former depositions being no longer available.

2d Division. Where in a competition for service, under the Service of Heir's Act 10 and
April 1. 1853. 11 Vict., c. 48, § 10, evidence had been taken *ex parte* before a commission
Decided 10. appointed by the Sheriff of Chancery, and the petitions for service had been
Mar. 1853. subsequently advocated, the Court granted diligence at the instance of other
competitors, for the production of the depositions.
Morgans v.
Morris, &c.

Deas, and *Dean of Faculty (Ingles)*, for the pursuers.
Shand, and *M'Farlane*, for the defenders.

Adam & Kirk, W.S., Pursuers' Agents.

Graham Binny, W.S., } Defenders' Agents. (R. S.)
Shand & Farquhar, W.S., }

No. 183. EDINBURGH & GLASGOW RAILWAY COMPANY v. ADAMSON
& OTHERS.

Poor Law Act—Assessment—Railway Stations.—In assessing a railway for the support of the poor, the stations at each end thereof and also along the line are not to be assessed separately in the several parishes in which the same are respectively situated, but are to be valued as forming a part of the whole railway, the value whereof is to be apportioned under the 45th section of the Poor Law Act.

1st Division. This was an action of declarator at the instance of the Edinburgh and
April 1. 1853. Glasgow Railway Company against the several parishes through which the
Decided 9. railway runs, concluding to have certain principles declared according to
Mar. 1853. which rates levied from the railway company, for support of the poor in their
parishes respectively, should be imposed. The conclusions of the summons
were—that “the pursuers fall to be assessed as heritors only, according to
the annual value of the foresaid railway, considered as heritable property,
the said annual value being estimated at such an amount as a tenant might
fairly be expected to pay for the railway, by way of nett rent, assuming him
to have the same power of using the railway, and the like privileges and ad-
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vantages with the pursuers," that in order to ascertain the amount of assess-
able annual value, there should be taken the gross receipts of the company,
and that therefrom there should be deducted a per-centage representing the
annual interest of the capital invested in the carrying trade; "such an ad-
ditional per-centage, or other sum as shall fairly represent the depreciation of
stock beyond the usual annual repairs and expenses; such a mileage rate or
other sum as shall be necessary for the renewal and reproduction of rails,
chairs, and sleepers, and other portions of the subject-matter of the rate as
are of a perishable nature, and for the maintenance of the way, such a per-
centage or other sum as shall fairly represent the tenant's profits, and fair pro-
fits of trade, and generally all such other sums and charges as may form just
and reasonable deductions in the ascertainment of the annual value." The
summons farther concludes, that a sum of £25,000 should be declared to be
the whole annual assessable value of the railway, "and that the said sum is to
be divided among the foresaid several parishes according to the distance which
the railway passes through, and is situated in each of the said parishes in
proportion to the whole length of the line," and that the pursuers are sub-
ject or liable to no other or farther assessment for relief of the poor in each
of the said parishes, than a single assessment imposed upon the said annual
value of the railway estimated as before mentioned.

To this action defences were lodged by the inspectors of the various parishes
through which the line of railway passes, denying generally the accuracy
of the sum mentioned in the summons as the annual assessable value of the
railway, and pleading that the pursuers are not entitled to have it declared
that they are assessable only as heritors, but must be dealt with as owners,
and are not entitled to the deductions claimed by them.

The Lord Ordinary (Robertson), "Finds, 1st, That the railway company
is liable to be assessed for poor rates, both in the character of owners and
also in the character of occupiers. 2d, Finds, that in assessing the said rail-
way, the stations at each end thereof, and also along the line, are not to be
assessed separately in the several parishes in which the same are respectively
situated, but are to be valued as forming a part of the whole railway, the
value whereof is to be apportioned under the 45th section of the Poor Law
Act libelled on. 3d, With respect to the mode of ascertaining the amount of
assessment, finds, that under the 87th section of the statute libelled on, the
annual value of the railway must be taken to be the rent at which, one year
with another, the said railway, in its actual state, might be reasonably ex-
pected to let from year to year, under deduction of the probable annual
average cost of the repairs, insurance, and other expenses necessary to main-
tain the said railway in its actual state, and all rates, taxes, and public charges,
payable in respect of the same: Finds, that in ascertaining the said rent, with
a view of fixing the value, in respect the pursuers occupy the said railway as
public carriers, deductions from the gross proceeds must be allowed for,—1st,
The annual cost and charges of conducting the business carried on by the
pursuers as such carriers, including therein the expenses of working the line
and maintaining the way, and of such ordinary repairs as would be made by
a tenant in possession of such subject, independent of the permanent repairs
falling on the owner, and forming a deduction after the rent has been fixed,

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but no deduction being made twice on account of the same repairs: Finds that deduction must also be made—2d, From the said gross proceeds for the interest of capital invested in the purchase of plant, including therein all articles necessary for conducting the said carrying trade, and also an allowance for the depreciation of capital in the said trade from tear and wear, and including therein an allowance for the tear and wear of the tools used, and in respect of deterioration of the stores necessary for carrying on the said business: Finds that deduction must also be allowed—3d, For contingencies arising from accidents, and all the foressaid deductions having been made or estimated according to the best calculation, and the same being kept in view, as well as the nature and extent of the speculation itself, in fixing the tenants' probable profits—Finds that a reasonable allowance must also—4th, Be deducted on account of such profits; and finds, that the rent being thus ascertained, deduction must then further be—5th, Made in terms of the statute of the probable annual average cost of the repairs, insurance, and expenses necessary for maintaining the railway in its actual state, but not including therein any of the repairs allowed under the head of maintenance of way already allowed for; and 6th, Deduction must also be made of all rates, taxes, and public charges; and with these findings, appoints the cause to be enrolled, in order that proper measures may be taken with the view of fixing the said rent and value, so that the amount of the assessment may be ascertained and fixed, reserving all questions of expenses.

In a note appended to his interlocutor, his Lordship stated that—"1. The first point is clearly fixed by the case of *Anderson v. the Union Canal*, 7th March 1839, 1 Dunlop, p. 668, and 2d January 1847, Dunlop, 9, 402.

2. That decision did not determine the second point as to the construction of the Poor Law Act, which was not then under consideration of the Court, otherwise the Lord Ordinary would have felt himself bound to follow it. He conceives, however, the meaning of the word *railway* in the 45th section to be not the mere line of rails, but the whole undertaking as an *unum quid*. He does not mean to say that the stations might be used for purposes not necessarily connected with the business of the railway, such as a large hotel, or that warehouses for stowing goods might be built, and that these should be free from separate assessment. But he considers the station-houses, the places where the carriages are kept or cleaned, the booking-office, and the like, to be as much a part of the railway, in the sense of this statute, as the line of the road itself. This view is much strengthened by the interpretation clause of the particular statute under which the defenders are incorporated, and also by the same clause in the General Railway Clauses Act. The former bears, that where in that Act "the word 'railway' is used, the same shall be understood to include the "branch railway, yards, stations, wharfs, and other works hereby authorized to be made." The latter, in like manner, bears, "the expression, the 'railway,' shall mean the railway and works by the special act authorized to be constructed."

Against the second finding of this interlocutor, certain of the defenders re-claimed.

Lorimer, Donaldson, Macfarlane, T. Mackenzie, Penney, Dunlop, and Deas, for the reclaimers.

Patton, Penney, and Dean of Faculty, for the respondents.

April 1, 1853.

The LORD PRESIDENT. The first finding of the Lord Ordinary's interlocutor is now acquiesced in. The second finding relates to the point to be at present decided. I see no sufficient ground for altering the interlocutor of the Lord Ordinary on this point. The question arises under the Poor Law Act 8 and 9 Vict. c. 83, which deals specifically with the matter of railways and canals. Section 45 deals with the railways as a whole, and apportions the annual value of the whole railway among the parishes according to the number of miles in each, not according to the relative parochial value of the works contributing to the gross annual value. The railway is to be taken as a whole, and the annual value thereof is to be ascertained and apportioned according to the enactment of the statute. The first thing to be ascertained is the annual value of the whole railway. The apportionment is a different thing. The 37th section says that in estimating the annual value of the railway the same shall be taken to be the rent at which, one year with another, such railway might in its actual state be reasonably expected to let from year to year. The question now to be decided, is, what are the component elements of this species of heritage called a railway? It is not merely the land on which the rails are laid. It is the whole composite subject making up the railway to be let. It comprehends the land and the rails, and tunnels, and bridges, and sidings, and banks, and also the stations as necessary parts or appurtenances of the railway.—It comprehends every thing which a tenant taking the railway from year to year would be entitled to expect as part of his tenement. The statute has singled out this new species of property called "Railway," and consisting of lands, and buildings, and excavations, and fixtures of various kinds combined as a whole, for one purpose and producing one annual value—and has desired the annual value of that composite subject to be ascertained—and being ascertained, to be apportioned in a particular manner. The only question now before us is, whether the stations, properly so called, are or are not component parts of the entire railway, from which the annual value of the railway is derived. I think that they are so, as much as the turn tables within them, or the railings outside of them.

There may, no doubt, be buildings at the stations, or on the sides of the railway which do not form necessary parts of the railway—such as stores or warehouses for goods, which may be let to carriers—Refreshment rooms, which may also be let. These, whether let or not let, are not necessary for the working of the railway. They are for the carrying on of a different business, and the interlocutor does not extend to these.—But stations are never let separate from the railway. They are component parts of the railway. I am therefore of opinion that the 45th section of the Poor Law Act would not be complied with if we did not take the annual value of the entire railway, including all its stations, as the assessable sum to be apportioned among the parishes through which the railway passes, according to the number of miles in each. It was argued that this would operate an inequality and injustice, because in one parish there are valuable stations and only a mile or two of railway, while in another parish there are no stations and an equal mileage of railway—and that the former is deprived of a great advantage by not dealing with the stations as separate subjects forming no part of the rail-

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April 1. 1853. way. It is said that valuable buildings which would have been separately assessed may have been displaced to make way for the stations, or might have been erected if the stations had not occupied the ground. That may be true in some cases. The very opposite may be true in other cases. The railway may have created the stations and the traffic, on ground which otherwise would never have been of any appreciable value for assessment. This, and many similar considerations might have been important, and some of them essential to have been attended to, if the statute had not contained the 45th section, for it would then have been legally an inquiry into parochial value. But the statute has only to do with the elements that constitute the annual value of the whole railway, as such, irrespective of its separate portions; and it introduces a rule of its own for apportioning that annual value, from whatever localities derived, among the different parishes through which the railway passes. We have, therefore, nothing to do with the various cases of supposed inequality or hardship that have been suggested from the bar. These were for the legislature.

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It does not appear to me that English cases are at all hostile to the views which I have expressed. In the English Poor Law there is no enactment similar to § 45 of our Poor Law Act. The inquiry in England is as to parochial value. The lands and buildings within each parish are rated in that parish, however used, whether for railway or anything else. In order to ascertain the value of the land occupied by a railway in parishes in which there were no stations, one principle adopted was what is called the mileage principle. They endeavoured to ascertain the value in each parish by ascertaining the value of the whole line, and dividing it by the mile. There was no statutory authority for doing so. It was only a mode adopted for convenience. It was the value of the land within the parish occupied by railway that was to be ascertained. Accordingly, the question as to the rating of stations which was presented to the Court of law, was this:—Whether, in estimating the value of the land occupied in a parish in which there were no stations, by a mileage proportion of the annual value of the railway, the company was entitled to deduct from the apparent annual value the amount of the sums on which their stations were already separately rated in the several parishes in which they had stations. It was found that they were entitled to such deduction. Why? Because these stations were truly appurtenances of the railway, and, if already separately assessed, the sum on which they were so assessed necessarily fell to be deducted from the apparent annual value. The principle of these decisions appears to me to be in favour of the view that the stations are to be regarded as part of the railway. Our 45th section is based upon the mileage principle, and gives it legislative sanction, prescribing, at the same time in plain terms, the rules by which it is to be carried out. The English cases, therefore, appear to me to be no way opposed to, if they do not actually confirm, the legal view which I venture to take of this question.

One Scotch authority was referred to,—the case of *Anderson v. the Union Canal Company*. I do not consider that case to be at all in point. 1st, It occurred before the date of the statute on which the present question depends. 2d, The question was scarcely argued in that case. 3d, The buildings there in question were not parts of the canal, as stations are of the railway. 4th, There being then no statute such as we have now, and it having been men-

tioned that in England such buildings are rated separately, as indeed they April 1. 1853. must be, on the principle of parochial earnings or value, the matter was so decided without almost any discussion. We have now had it very fully dis-
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 cussed with reference to the statutory enactment, which, in my opinion, takes it altogether away from the English cases or the case of *Anderson*, and puts the matter on a very plain principle, to which the Lord Ordinary has, I think, correctly given effect.

LORD FULLERTON. I so entirely agree with your Lordship that I think it unnecessary to occupy the time of the Court by saying anything in addition.

LORD CUNINGHAM. I had at first some doubt of the finding of the Lord Ordinary throwing the valuation of the large and magnificent station-houses which have been built at the *termini* of most of the railways into the average of the proceeds of lines between intermediate towns; and I was especially moved by the consideration that this was, at least to a certain extent, contrary to the practice of England. The law of rating in the two countries, however, does not admit of assimilation in practice; and, as an abstract question, I incline to think that our own rule is as fair and equitable as that of England. It would be hard to make the stations in provinces and country towns a part of the railway, and not the larger premises required in great towns. The limitation as proposed by your Lordship, limiting the extent of the buildings at the *termini* to be calculated as station-houses, excluding cellars, inns, and other accommodation, may possibly obviate any great inequality in the assessment.

LORD IVORY concurred.

The COURT, therefore, "adhere to the interlocutor reclaimed against, in so far as regards the first and second findings thereof, and to that extent refuse the reclaiming note; . . . and, before farther answer as to the other findings in the said interlocutor, and without prejudice to any other investigation that may hereafter be considered proper, remit to Andrew M'Ewan, accountant in Glasgow, to prepare a state on the principles of the interlocutor of the Lord Ordinary, shewing the gross proceeds of the railway and the amount of the several deductions, which, according to the said interlocutor, fall to be made therefrom, in order to bring out the fair rent at which the railway might be expected to let from year to year, as also shewing the amount of the several deductions to be made from such rent, in order to bring out the assessable annual value, with power to the said Andrew M'Ewan to call for production of books and documents, and to receive explanation from parties; and also to report such alternative views as may be suggested by either party."

David Smith, W.S., Pursuers' Agent.

James Burness, S.S.C. }

J. R. Stodart, W.S., }

James Morgan, S.S.C., }

Respondents' Agents.

(J. S. M.)

scheme of valuation except "the forest of Benalder," of which no mention was made whatever. The decret of valuation, which specified a *cumulo* sum as the yearly avail of the pursuer's lands libelled, was written on the back of the scheme of valuation to which it bore special reference. In the extract decret no mention of the forest was made:—*Held*, that the forest was teindable and not included in the valuation.

1st Division.
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This was a process of augmentation and locality at the instance of the minister of Laggan, against the heritors. In the augmentation, separate condescendences were put into process by the different heritors, founding upon certain decreets of valuation, which were said to comprehend the whole lands of the parish, and alleging that, in virtue of surrenders made by their authors in a former locality, under these decreets, the whole teinds were exhausted. Objections were lodged by the minister to the scheme of rental, and disposed of except as regards the forest of Benalder and grazings, which were alleged to be unvalued and teindable. This forest belonged in 1757 to the Duke of Gordon. In that year a summons of valuation was raised by his Grace, which narrates that the pursuer has pertaining to him, "all and hail, the lands" therein specified, lying in several parishes, and, *inter alia*, in the parish of Laggan, "with the forests of Badenoch aftermentioned, viz., forest of Benalder, forest of Drumochter, forest of Gaick, and forest of Glenfeshie." It then sets forth that the teinds of the said hail lands were unvalued, and concluded for valuation in the ordinary style. A scheme of valuation was lodged, containing a specific enumeration and relative valuation of the lands mentioned in the libel, and *inter alia* of those lying in the parish of Laggan, but no mention was made in the scheme of the forest of Benalder. Decree of valuation was thereafter pronounced. It was written upon the back of the scheme to which it bears special reference as the "within scheme." It declares "the constant yearly avail of the pursuer's lands libelled in stock and teind parsonage and vicarage to be now and in all time coming the particular sums of money following, viz.," which particular sums consist of the *cumulo* valuations of the pursuer's lands according to parishes. It then declares the *cumulo* sum of L.2769 : 17 : 4 Scots, "to be the constant yearly avail, &c. of the pursuer's respective lands above mentioned in all time coming." The extract embodying the whole previous procedure contained a specific enumeration and valuation of the individual subjects taken from the scheme, and thus omitting the forest of Benalder.

It appeared that at the date of making up this scheme the forest of Benalder yielded no rent, being in the natural possession of the proprietor. It was afterwards let as a sheep farm, and now returns as a deer forest L.230 of yearly rent. The question now was, whether it must be held to have been included in the decret of valuation or not.

The Lord Ordinary, (Wood), "Finds that the forest of Benalder cannot be held as valued, except in so far as any part of it can be shewn to be included in the scheme referred to in the decree of valuation." The respondent reclaimed.

In obedience to a remit, the teind clerk reported that "the extract referred to has been correctly framed according to the data afforded by the proceedings in the valuation, and to the usual practice of the teind office, and that were an extract of the decree required at the present time, he could not frame it in

any other form. The forests referred to could not have been separately inserted in the decerniture at no value, for the process is one of valuation, not of declarator. Neither could they have been attached to or comprehended in any of the other parcels of lands, for each is an integral and separate possession, having its distinct value attached to it, and to it alone. . . . No decerning words can be found in the interlocutor in question which would authorise him to include these forests in the extracted decree, all that exists being a statement of the witnesses that they could, at the date of the valuation, assign no value to these subjects, and they are no farther dealt with," &c.

Deas, was for the objector.

H. Robertson, for the respondent.

LORD FULLERTON. The question here, which is a narrow one, is, are we to hold that there has been a valuation? I cannot hold this. Unquestionably the burden of proof falls on the party who avers a valuation, and he has not made out his case. The forest was a distinct subject from the other subjects mentioned in the scheme of valuation. It was not included in any of them, and it was known by a separate name.

LORD IVORY. I think it little better than a mere toss up whether our decision should be the one way or the other. No doubt the decree, looking to its terms, is a decree of valuation of the lands libelled; and if the matter had stood there alone, it would have been difficult to say that they were not lands within the decree; but then it is written on the back of a scheme which does not leave a mere generality, but places a specific valuation upon the various individual subjects, with exception of the forest of Benalder, which is not even one of the subjects enumerated therein. It appears to me most important that we have a *contemporaria interpretatio* of this decree *in foro*, for the extract excludes the notion that the extractor understood the decree to go beyond the individual items in the scheme. Our own clerk also tells us that if he were now to be called on to give an extract, he could not give it in different terms. Therefore *in dubio*, I think it is better to let it stand as construed by the clerk at the time than to give a different construction from what has stood for a hundred years.

The LORDS PRESIDENT and CUNINGHAME concurred.

The COURT, "adhere to the interlocutor of the Lord Ordinary" with expenses.

Jollie, Strong, & Henry, W.S., Objector's Agents.

M'Kenzie, Innes, & Logan, W.S., Respondent's Agents. (J. S. M.)

FRASER v. FRASER.

No. 185.

2d and 3d Vict. cap. 41, sec. 54—*Sequestration—Trustee—Sheriff's Deliverance—Appeal—Held*, that Sunday is counted in reckoning the period of two days within which an appeal against the Sheriff's deliverance appointing a trustee on a sequestrated estate must be lodged in the hands of the Sheriff-clerk.

This was an appeal against a judgment of the Sheriff-Substitute of Inverness-shire, preferring the respondent to the office of trustee on a sequestrated state. To the competency of this appeal, an objection was taken by—

E. S. Gordon, for the respondent, that the appellant had failed to give notice to the Sheriff-Clerk of his intention to appeal within two days, as required by section 54 of the statute. The deliverance of the Sheriff was

Outer House.
April 1. 1853.
Decided
Mar 19. 1853.

as *Fraser v. Fraser*.

April 1. 1853. issued on the 25th of February, being a Friday, and it was not till the following Monday that the appellant's notice was given.

Fraser v.
Fraser.

T. Mackenzie for the appellant:—The two days following the day on which the Sheriff's deliverance was issued, were Saturday and Sunday. But Sunday must be held to be a *dies non* as regards this matter. The meaning of the statute is, that notice of appeal must be given within two legal days; and therefore Saturday and Monday were the days on which notice might competently be given.

The Lord Ordinary (Curriehill), dismissed the appeal as incompetent, and added the following note to his interlocutor:—The question raised in this case is not free from difficulty; and the difficulty is not conclusively obviated by the judgment in the case of *Foulds v. Fotheringham*, 22d Dec. 1843, Jurist; because the opinion of the Judges in that case appears to save the question as to the effect of the *last* of a certain number of days prescribed for doing anything being Sunday. But one of the grounds of the judgment in that case does appear to apply clearly to the present question. The 54th section of the statute confers the privilege of appealing in such a case as the present only on a party who gives notice of his intention to do so to the Sheriff-clerk "within two days after the date of the Sheriff's deliverance." This enactment is explicit and unqualified as to the period of time within which the notice is to be given, and, therefore, without a departure from the explicit language of the enactment, the period cannot be extended to three days; and although there might have been much force in the appellant's reasoning as to Sunday being *dies non* in such a case, if the legislature in framing this enactment had not had in view the distinction between Sunday and working days; yet as in several of the sections, of which the 20th may be taken as an example, the legislature appears to have had the distinction clearly in view, and to have qualified the enactments by describing the times as consisting of a certain number of lawful days when the intention was to exclude Sunday, the omission of that qualification in some enactments, such as that in the 54th, and other sections, cannot properly be held to have been unintentional.

L. Mackintosh, S.S.C., Appellant's Agent.

Horne & Rose, W.S., Respondent's Agents.

(J. S. M.)

No. 186. CATHERINE FRASER OR KERR v. PROCURATOR FISCAL OF INVERNESS.

Evidence, admissibility of—Confession—Police-Officer—Examination of Prisoner.

Circuit Court,
Inverness.

April 21. 1853.

Fraser v. Procurator Fiscal
of Inverness.

This was an appeal against a sentence of the Sheriff-Substitute of Inverness, pronounced upon a libel which charged Fraser and Macfarlane with theft, and appellant with reset of theft. The appeal was taken on the ground that the Judge ought not to have admitted in the appellant's case the evidence of Anderson, superintendent of the Inverness police. The following is extracted from his evidence before the Substitute:—"I charged the pannels (Fraser and Macfarlane) with the theft. The two girls were separate. I told Fraser that Macfarlane had confessed. This was not true. Fraser denied. Macfarlane confessed, on my telling her that Fraser had confessed. I went to Mrs Kerr's (the appellant); I charged her with reset of the purse

and monies. I said that I knew she must have it, as the women had said April 21. 1853. that they had only L.8 back from her, and she must have L.3. She then said the girls had been in the house," &c. It was objected to this witness that he had not warned pannel not to answer unless she pleased.

Fraser v. Procurator Fiscal of Inverness.

The Sheriff-Substitute repelled the objection, and Kerr appealed.

Millar, for appellant, argued that a police-officer is not entitled at his own hand, especially after making the charge, to pursue such a course of examination as is calculated and intended to lead the suspected party to criminate himself. His duty is merely ministerial, to apprehend and convey before the magistrate, who may examine the prisoner. But even the magistrate cannot do this without warning. In this class of cases no warrant is required, an officer of police being himself a walking warrant.

Fordyce, (*Advocate-Depute*),—Admitting the general principle, it has no application here, as the appellant was not at the time in custody upon the charge; the officer was only examining her as an ordinary individual, for the purpose of finding out who the guilty party was; and he has no title to take into custody, as he had no warrant.

The LORD JUSTICE-CLERK held that the evidence ought to have been rejected.

His Lordship also observed, as regarded the course pursued by Anderson towards Fraser and Macfarlane, that in the whole course of his experience he had never heard of a policeman going to a person and telling a deliberate falsehood in order to procure a confession. He must be regarded as utterly unworthy of credit who prostitutes his office to so base a purpose.

Appeal sustained and sentence quashed.—Appellant found entitled to expenses of the appeal.

(J. M. M.)

HER MAJESTY'S ADVOCATE v. ALEXANDER ROBERTSON AND EUPHEMIA ROBERTSON. No. 187.

Evidence, admissibility of—Confession.

Pannels, being brother and sister german, were charged with incest; and Euphemia pleaded guilty. Circuit Court, Perth.

Alexander, however, having pleaded not guilty, *Fordyce*, (*Advocate-Depute*), April 27. 1853, proceeded to lead evidence, from which it appeared that the female pannel had given birth to a child. The inspector of poor of the parish of Dunfermline deponed to an arrangement made by him with the male pannel, under which the latter had contributed to the support of this child as its father. He had, however, consented to do so on a representation by witness that his refusal would expose him to a criminal prosecution for desertion under the Poor Law Act. H. M. Advocate v. Robertsons.

The LORD JUSTICE-CLERK refused to receive this evidence, on the ground that the acknowledgment of paternity had been obtained by undue influence, and was not of a kind admissible in criminal practice. His Lordship also held, that the same undue influence continued to operate so as to render inadmissible evidence of an acknowledgment of paternity repeated to witness after the lapse of several days, although witness had not renewed his threats.

The Advocate-Depute then deserted the diet against the pannel.

(J. M. M.)

No. 188. HER MAJESTY'S ADVOCATE, v. WALTER BLACKWOOD.

Assault with loaded firearms—Stat. 10 Geo. IV., c. 38, sec. 2, construction of.

Circuit Court, Glasgow, May 2. 1853. Pannel was charged with an assault with loaded firearms under 10 Geo. IV., c. 38, § 2, in so far as he did wilfully, maliciously, and unlawfully, present, point, or level "a pistol loaded with gunpowder, and with a piece of paper as wadding, at," &c.

H. M. Advocate, v. Blackwood. A. Moncrieff, for pannel objected, that the statutory offence was not relevantly set forth. The statute is directed solely against the use of *loaded* firearms. In common language the term "loaded," as applied to firearms, implies that a ball or other dangerous missile has been inserted above powder and wadding.

Cleghorn, (*Advocate-Depute*) in reply, was proceeding to refer to English authorities, when he was stopped by—

LORD COWAN, who repelled the objection, observing that injury may be done by the wadding alone, and if it be dangerous to fire wadding by itself at any person, the statute must be held to apply. (J. M. M.)

No. 189. HER MAJESTY'S ADVOCATE v. DANIEL TAYLOR.

Forgery.—A party fabricated and uttered a letter as from A. M. to his sister, and subscribed it, "Yours, &c., A. M., signed for me, I cannot":—*Held*, this was forgery.

Falsehood, fraud, and wilful imposition.—Objection repelled, that the crime was not completed where pannel had voluntarily taken no steps to obtain possession of money, which on false or fraudulent statements in a letter he had procured to be sent, to lie for him till called for, at a certain address.

High Court of Justiciary. Pannel was charged with forgery; as also the using and uttering as genuine, a forged letter; as also, falsehood, fraud, and wilful imposition; "IN so

May 16. 1853. FAR as . . . you did wickedly, feloniously, and falsely, fabricate and forge, or cause to be fabricated and forged, a letter in the following or similar terms, 'Edinburgh, 16th Feb. 1853,—My dear Tib., I cause this to be written you in strict confidence. . . . I came to Edinburgh last night, and have got into a most unpleasant dilemma, and amongst the rest, my hand is so hurt I cannot write, but have got the assistance of a stranger, but I will try to scrawl my name. My money has been taken from me in the meantime, but I will get it back. I am therefore without funds, and can do nothing, while I am informed two pounds are required. Enclose them in a sheet of paper and pay the postage, addressed to Mr Taylor, Post Office, Edinburgh, and mark at the corner, to lie till called for, and I will get them. . . . My dear Tib., your afflicted brother, ANDREW MUIR, signed for me, I cannot;' and did address the same or cause the same to be addressed to Miss E. Muir, 15 War-

H. M. Advocate v. Taylor. riston Crescent, Edinburgh; you falsely and feloniously intending that the said letter should pass for, and be received as a genuine letter which Andrew Muir, then and now or lately wine merchant in or near Carter Lane, Doctors Commons, London, . . . had authorised and caused to be written and signed for him, because his hand was so hurt he could not write himself, to Elizabeth Muir. . . . FURTHER, . . . you, the said Daniel Taylor did wickedly and feloniously use and utter as genuine the said false, fabricated, and forged letter, knowing the same to be

false, fabricated, and forged; by then and there posting the same, . . . May 16. 1853.
 addressed as aforesaid, in order that the same might be conveyed by post and
 delivered to the said Elizabeth Muir . . . and the same was . . . H. M. Advo-
 delivered to and received by the said Elizabeth Muir accordingly; and you cate v. Taylor.
 did thus wickedly and feloniously, falsely, fraudulently, and wilfully deceive
 and impose upon the said Elizabeth Muir, and induce her to believe that the
 said letter was genuine, and that the contents thereof were true, and she did
 in consequence . . . write a note or letter intended for the said Andrew
 Muir, . . . and did enclose the same along with two bank or banker's
 notes for £1 sterling each . . . in an envelope . . . which she
 addressed or caused to be addressed to 'Mr Taylor, Post Office, Edinburgh,'
 and marked . . . 'to lie till called for,' all as requested in the said false,
 forged, and fabricated letter; and having affixed a postage stamp thereto,
 did, the same day, post the said envelope . . . in the General Post
 Office . . . ; and all this you, the said Daniel Taylor, did," &c.

Craufurd, for pannel, stated two objections,—*First*, The charge of forgery is irrelevant. To constitute forgery the signature of the party on whom the crime said to be practised must be on the document, or said to be on it. Here the letter itself bears the contrary. In short it is not a subscribed writ. *Secondly*, The charge of fraud is irrelevant, in respect the libel does not set forth that the criminal act was completed by pannel's taking steps to get the money-letter into his possession. Till it was claimed, there was *locus penitentiae*. He voluntarily stopped short in the commission of an offence, and he cannot, therefore, be punishable for it.

Young, (*Advocate-Depute*) *contra*. The letter purports to be the genuine and authorised writ of Muir. This case falls under the principle of the English cases, which decide that a party who signs a document with his own name, but with the false and fraudulent addition of "per procuration of" another party, commits forgery; see *Maddock's case*, 2 Russ. 480, and *Roscoe's Digest*.

LORD COCKBURN. Without committing myself to a legal definition of forgery, I may state the general notion of it to be this, that it is the misleading a person to believe that to be a genuine document which is not. In this case where the letter was passed off on the lady as the authorised letter of her brother, I think we have all that is required to constitute a good charge of forgery. It is not necessary, in my opinion, that forgery must be of a signature. There is nothing in the second objection. How often swindlers fail in getting what they want. The act of fraud was completed by uttering the letter.

The LORDS JUSTICE-GENERAL and ANDERSON concurred.

Objection repelled.

(J. M. M.)

SUMMER SESSION.

No. 190.

LAING v. PARK AND OTHERS.

1st Division.

May 20. 1853.

Process—*Contingency*—*Act 18 and 14 Vict., c. 36, sec. 38.*

This was a verbal report by Lord Curriehill, made in the following circum-

Laing v. Park
and Others.

May 20 1853. *Laing v. Park and Others.* stances:—his Lordship stated that there were two actions in to-day's printed roll, of which the one, an action of count and reckoning, appeared in Lord Cowan's roll, while the other, an advocation, was enrolled before his Lordship. The statute 1 and 2 Vict., c. 86, and Act of Sederunt 24th December 1838, § 6, provide that where there is contingency the action is to be remitted to the roll of the senior Lord Ordinary. In the present instance there is a sufficient contingency for that course to be followed, but the statute 13 and 14 Vict. cap. 36., § 33, provides that the respondent in an advocation is to have right to choose his own Lord Ordinary. He, therefore, reported the point for the purpose of receiving the instructions of the Court how to proceed.

Cook, was for the pursuer.

Baillie, for the defender.

The LORD PRESIDENT. I do not think that § 33 materially affects the case. The great object of that section was to give a certain power to the respondent in an advocation; but it is not stronger than the clause applicable to ordinary actions, which gives the respondent the right to choose his own division. This is apart from contingency which remains untouched. It deals with the right to enrol, and therefore I do not think that you are embarrassed with the provisions of § 33.

LORD FULLERTON concurred.

LORD IVORY. I am of the same opinion. The recent Act deals with the right to enrol, and the former Act comes into operation when the enrolment has taken place.

Dalmahoy & Wood, W.S., Agents for Pursuer.

Thomson & Elder, W.S., Agents for Defenders.

(J. S. M.)

No. 191.

MACKENZIE v. CAMERON.

Process—Reclaiming Note—Error in Designation.—Where a reclaiming note presented in a suspension, ran in name of "*John Mackenzie*," instead of "*James*:"—*Held*, that the error was not fatal, but might be corrected.

Act 13 and 14 Vict., cap. 36, sec 11—Boring.—*Held*, also, that it is not necessary that such a reclaiming note be boxed within ten days after the interlocutor reclaimed against has been pronounced.

1st Division. This was a reclaiming note against an interlocutor of the Lord Ordinary on the Bills (*Curriehill*), in a suspension at the instance of Cameron against Mackenzie. To this reclaiming note it was objected by—

Mackenzie v. Cameron.

Mackintosh, for the respondent, that in the note of suspension Mackenzie was designed as "*James Mackenzie*, late innkeeper at Orrin Bridge, in the parish of Urray, Ross-shire, at present residing at Tenacairn of Ferrintosh, charger." This reclaiming note is at the instance of "*John Mackenzie*, late innkeeper," &c. This therefore is no better than a reclaiming note in name of "*John Smith*," or a person of any other name than "*James*," or than if a reclaiming note had been presented without a name at all. *Dalglish v. Hamilton*, 6th July 1753, M. 4163; *Reid*, 16th January 1739, M. 4154, and 11,273; *McDonald*, 21st December 1751, M. 4162; *Guthrie v. Munro*, 27th February 1833, 11 S. 465; *Muir v. Chambers*, 10th July 1845, 7 D. 1009; *Ramage*, 27th May 1828, 6 S. 853; *Jackson*, 9th Dec. 1825, 4 S. 292;

Craig, 23d November 1841, 4 D. 54; *Milne's Trustees*, 12th November 1842, May 20. 1853. 5 D. 68; *the Crown v. Muir*, 21st December 1829, 5 Deas and Anderson.

Monro, contra. This is a mere clerical error. The surname and designation, *Mackenzie v. Cameron.* "Mackenzie, late innkeeper, &c.," leaves no doubt as to the identity of who was meant. The cases cited were cases of diligence and such like, where a mistake in the designation is material.

The LORD PRESIDENT. I do not think that I have seen an objection of this kind before; but I think it is one which may be corrected.

LORD FULLERTON concurred.

LORD IVORY. I think it is impossible not to discern that this is a clerical error. The distinction to be taken is this:—In such writs as are grounds of diligence, or the commencement of process on which decree is to follow, the designation must be correct. If this had been in a charge, there would have been good grounds for the objection, and it would have been fatal, but in the charge, Mackenzie is well named, and it is only in the course of the proceedings that it occurs. There an error is less material, and in the present instance, I think it may be corrected.

Objection repelled.

Mackintosh farther objected that the reclaiming note had not been boxed within ten days after the interlocutor reclaimed against had been pronounced. By 13 and 14 Vict. c. 36, § 11, all interlocutors except judgments on the merits and decrees in absence must be reclaimed against within ten days. The Act of Sederunt of 24th Dec. 1838, by which fourteen days were allowed, and which applied to suspensions for reponing as in the present case, must be held to be over-ridden by the 13 and 14 Vict. c. 36, which has been held to regulate sequestration processes as being bill chamber processes. This being a case therefore to be regulated by that statute, and the reclaiming note having been presented after ten days, such note is incompetent; *Arnold*, 11th March 1852, and 21st March 1852; *Scott v. Anstruther*, 10 D. 732.

Monro, contra.

The LORD PRESIDENT. This does not apply to an interlocutor passing the note. The objection must therefore be repelled.

LORDS FULLERTON and IVORY concurred.

A. Pearson Scotland, S.S.C., Agent for Charger and Reclaimer.

L. Mackintosh, S.S.C., Suspender's Agent.

(J. S. M.)

HOLEHOUSE v. WALKER.

No. 192.

Process—Issues.—In an action of damages brought on the ground that a charge of forgery against the pursuer had been lodged by the defender with the procurator-fiscal, maliciously and without probable cause, and had been calumniously circulated by him throughout the country:—*Held*, that the words "maliciously and without probable cause" must be inserted in the issue relative to the information lodged with the fiscal, but not in any of the other issues relative to the other occasions on which it was alleged the charge was repeated.

This case, which was an action of damages for defamation, came before the 1st Division. Court for the adjustment of issues on the report of the Lord Ordinary May 21. 1853. (Anderson.) The nature of the case was shortly as follows:—The defender having refused to make delivery to the pursuer of a quantity of *Holehouse v. Walker.*

May 21. 1853. *Holehouse v. Walker.* oats, in terms of an alleged agreement, the pursuer raised an action, concluding alternatively for implement or for damages for breach of contract. Thereafter the procurator-fiscal wrote to the pursuer's agent that information had been lodged with him to the effect that the pursuer had forged the name of the defender to a sale-note of oats, and had used the forged writing in support of the action of implement and damages raised by him, and that a warrant had been obtained for his apprehension. After investigation, the fiscal declined to take any proceedings against the pursuer. This present action was raised by the pursuer, who is an inn-keeper at Invergordon, on the ground that the information on which the procurator-fiscal thus acted was lodged by the defender falsely, maliciously, and without probable cause,—that the defender circulated through the country that the pursuer had forged his signature to the sale-note in question, and in a letter to the pursuer's agent, besides reiterating the charge, had insinuated that the matter had been "privately" and collusively settled between the pursuer and the procurator-fiscal; and that the calumnious charge had injured the pursuer most seriously in his credit, character, and feelings.

The following issues were proposed :—

Whether, on or about the 28th day of November 1851, within or near the office of the procurator-fiscal for the eastern district of Ross-shire, or within or near the Sheriff-clerk's office there, the defender did, maliciously, and without probable cause, falsely state to the said procurator-fiscal, that the pursuer had forged his, the defender's name, or did sign a false declaration or information to that effect, and did thus falsely accuse the pursuer of the crime of forgery; in consequence of which the pursuer was required to emit, and did emit, a declaration, as a party charged with the said crime, to the loss, injury, and damage of the pursuer?

Whether, on or about the 24th day of November 1851, in or near the office of the Commercial Bank of Scotland, in Invergordon, and in presence and hearing of Andrew Munro, bank agent there, and of Robert Luff Peploe, accountant in the office of the said bank, or of one or other of them, the defender did falsely and calumniously say and assert that the pursuer had forged his, the defender's name, or did use or utter words of similar import and effect, to the loss, injury, and damage of the pursuer?

The other issues were in similar terms, but adapted to the occasions on which the charge of forgery was alleged to have been made.

Counter issue by defender :—

Whether the said alleged subscription of the defender is not his genuine signature; and the defender had reasonable cause for stating that the alleged signature had been forged by the pursuer?

Fraser, for pursuer. The defender insists upon the words "maliciously and without probable cause" being inserted in all our issues. We do not object to this so far as the case relates to the information given to the fiscal, but in the other issues we cannot be called upon to insert these words, and this was the clear opinion of the Lord Ordinary. If the defender wishes a counter-issue here he must plead the *veritas convicii* directly.

Shand, for defender. As to the issue for trying the point of information lodged with the fiscal, parties are at one. As to the other issues, we must

either have such a counter-issue as we have proposed, or it must be distinctly understood, that without the form of a counter-issue, we are to have the fullest opportunity of bringing out in evidence the whole of the facts and circumstances of the case as pleaded in the record. May 21. 1853.
Holehouse v.
Walker.

The LORD PRESIDENT. Whatever the defender has averred in his pleadings will undoubtedly be admissible at the trial. He does not plead the *veritas*, and he does not need to do so. He says the signature is not his, and he explains how the pursuer made use of the document to which it is appended. Unquestionably he can plead the whole *res gesta*. After the case is fully disclosed on the evidence, the Judge will direct the jury whether in the whole circumstances the pursuer has proved a relevant and proper case of defamation, or whether the defender has shewn that his conduct was excusable and justifiable.

Issues approved of.

Fraser moved that the case be remitted back to the Lord Ordinary, that it may be tried during the session.

Shand, for defender. The case now being in the Inner House, it will fall to be tried by the Lord President at the July sittings. In the other Division, when a case comes in by report in this way, it is not sent back to the Ordinary.

LORD PRESIDENT. We are not inclined to follow the rule of the Second Division. In our opinion, such a course might frequently give a defender, who chooses to object to the issue in the Outer House, an undue advantage in obtaining delay.

John Galletly, S.S.C., Pursuer's Agent.

L. Mackintosh, S.S.C., Defender's Agent.

(J. S. M.)

MAGISTRATES OF HAMILTON v. HART'S TRUSTEES.

No. 193.

Process—6 Geo. IV., cap. 120, sec. 18—*Judicature Act*—*Reclaiming Notes*.—*Held*, that it is not imperative on the claimer's agent in serving the reclaiming note to accompany it with a full copy of the record.

This was a reclaiming note, to the competency of which it was objected by 1st Division.

Monro, for the respondent, that six copies of the note had not been lodged with the respondents' agent in conformity with the *Judicature Act*, 6 Geo. IV. c. 120, sec. 18, inasmuch as the appendix did not contain a copy of the summons; *M'Donald v. Taylor*, 10th Feb. 1844. It is the universal understanding and practice of agents to furnish a complete copy of the record, and were it otherwise, great hardship would ensue. See also *Waddel v. Cunningham*, 14th Nov. 1850. May 21. 1853.
Magistrates of
Hamilton v.
Hart's Trustees.

Penny, *contra*. The procedure is regulated by Act of Sederunt 11th July 1828, sec. 77; it is not there rendered imperative on the claimer's agent to append to the note a full copy of the record; *Roberts v. Roberts*, 14th Nov. 1833, Jurist.

The LORD PRESIDENT. No doubt the practice very properly is to lodge six full copies with the respondent's agent; but the question is, is the neglect so to lodge them a fatal omission? It does not appear to me that it is so. On the contrary, the case of *Roberts* is a case directly the other way.

May 21. 1853. The other Judges concurred.
Objection repelled.

Magistrates of
Hamilton v.
Hart's Trustees.

Wotherspoon and Mack, S.S.C., Reclaimers' Agents.
Ferguson and Stuart, W.S., Respondents' Agents.

(J. S. M.)

No. 194.

LAING AND SONS v. HAIN.

Sale by Auction—Delivery—Personal objection.—Where horses were sold by public auction without stipulation as to credit, and the purchaser allowed two days to elapse without tendering the price:—*Held*, that the seller, who had never parted with the possession, was entitled on the third day to resell them without communication with the original purchaser or judicial authority; and to sue the original purchaser for the difference in the prices, and for the keep of the horses between the periods of sale and re-sale, and the expenses of the re-sale:—*Opinion*, that a purchaser at a public auction cannot be allowed to plead that he was ignorant of the articles and conditions of the sale.

2d Division. The Messrs Laing, pursuers, hold at their bazaar a public auction for the sale of horses every Wednesday. At one of these auctions on 24th July 1850, the defender, Hain, who was unknown to the pursuers, purchased three horses at the price of £55, 10s.; but, as he was unable to pay for them on the spot, they were retained at the stables attached to the bazaar. The defender never having tendered payment, the pursuers privately re-sold one of the horses on the 27th July, and the other two at their auction on the Wednesday following, at a loss of £6, 5s. For this sum, together with the expense of keep till the respective periods of re-sale, and their commission and charges on the re-sales, they sued Hain before the Sheriff of Perthshire. Besides maintaining the conclusions of their action on the ground, that, in the above circumstances, the defender had failed to implement his part of the contract "after reasonable delay being given," they founded on certain conditions and regulations of the sales at their bazaar, which, they alleged, were posted up in the most conspicuous places, and the attention of intending purchasers called to them at the time of each sale. These regulations bear, that should the purchase money not be made good within twenty-four hours, the exposers are at liberty to re-sell the lot either privately or by auction, and that without giving notice to the purchaser, who, in such case, is declared to be debtor for any difference or loss which may arise out of the non-fulfilment of the bargain, including commission on the re-sale, keep, and all other charges. On the other hand, Hain professed his ignorance of the existence of any such regulations, and denied the averments of the pursuers on this point. He pleaded, that as he was able and willing to pay for the horses, the seller had no right to dispose of them without his consent or notice to him, and without judicial authority.

Proof having been led, the Sheriff-substitute assoilzied the defender, on the ground of the "signal failure of proof of any publication of the articles founded on by the pursuers." But the Sheriff-depute recalled this interlocutor, supporting the pursuers' more general ground of action. He "finds that the defender purchased the three horses at the prices alleged by the pursuers, at a public auction, but did not pay for them, or offer payment for them, at the time, or during the next three days: Finds it not proved that the sale was on credit: . . . Finds that the defender was informed at the sale that payment was required, and that an offer of security was not sufficient, but that, nevertheless, the defender

did not offer payment; finds that the horses were, after a reasonable delay, ^{May 25. 1858.} resold, and the prices obtained duly credited in the account produced; therefore finds, in point of law, that the defender, having purchased and failed to pay for the said horses after reasonable delay, is liable to the pursuers in the difference between the prices he purchased at and the prices subsequently obtained, and for the keep of the horses during the interval between the sale and re-sale, and the expense of the re-sale," &c. The defender having advocated, the Lord Ordinary reported the cause under the Court of Session Act.

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T. Mackenzie, for the advocator, laying aside the idea of there being any special contract, argued that a seller cannot, without judicial warrant, re-sell on the purchaser's default; *Greaves v. Ashlin*, 3 Camp. 426; *Martindale v. Smith*, 1 Ad. and Ell., 389; *Bell on Sale*, 109. But, supposing him to have this power, it would operate as a rescinding of the contract; and having taken his remedy in this way he could not hold the original contractor responsible for the difference of price *nomine damni*.

Logan, for the respondents, was not heard.

The LORD JUSTICE-CLERK. I am ready to affirm the Sheriff's interlocutor *simpliciter*. Though it has been put together so as to avoid this question, still I am of opinion that no one who has gone to a public auction can pretend to ignorance of the articles and conditions of the sale, about which it is his duty to inquire. The interlocutor is impregnable.

LORD WOOD. The interlocutor of the Sheriff states quite enough for the decision of the case. But I do not wish it to be understood that I am of opinion that it is necessary to prove that a party purchasing at an auction was made aware of the articles and conditions of the sale. He must be held to have known them.

The COURT "repels the reasons of advocacy, and remit *simpliciter* to the Sheriff; find the advocator liable in expenses," &c.

John Ross, S.S.C., Advocator's Agent.

A. J. Napier, W.S., Respondents' Agent.

(J. M. M.)

NOTE.—See *Maclean v. Dunn*, 4 Bingham, 722.

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No. 195.

Sale—Railway Shares—Original Allottee—Scrip-holders—Registration of Shares—Forfeiture.—An original allottee in a projected railway company sold his shares after a deposit had been paid by him. The holders of scrip corresponding to these shares refused to comply with a notice issued by the directors to register, and the shares were accordingly registered in name of the original allottee. Thereafter an Act was passed dissolving the company. A residue of the deposit money remained as a fund for distribution:—*Held*, (Lord Fullerton diss.) that in a question between the original allottee and the purchasers and holders of the scrip, the former was not entitled to claim the proportion of the residue effeiring to such shares, and that the scrip-holders had not forfeited their right to them and to such residue.

The East Lothian Central Railway Company was projected in 1846. The 1st Division. pursuer was an original allottee of certain shares therein, and paid a deposit ^{May 25. 1853.} of L.2 on each share. In January 1847 scrip certificates applicable to the respective shares were issued. These certificates passed from hand to hand, and the defenders became holders thereof to the number of 4295. Some

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In virtue of the certificates held by them the defenders became entitled, in the event of the Act being passed, to be registered as owners of the shares to which the certificates applied. The Act passed on the 9th July 1847.

Thereafter, on 29th September, the first statutory meeting was held, and was attended both by certain original allottees, or, as they were termed, shareholders, and by certain scrip-holders, including the defenders. A motion having been made for continuing the directors named in the statute for another year, an amendment was moved by the defender Drew, that certain other directors should be elected. The meeting, however, adjourned till 14th October, when an objection was taken to the right of the scrip-holders to vote, and the amendment proposed by Drew at the former meeting was withdrawn, the chairman having agreed, in the event of the directors being re-elected, that four of them should retire from office previous to the 1st January 1848, so as to admit of the election of four others to be named by Drew.

In December 1847, by order of the directors, intimation was made to the scrip-holders to send in their scrip for registration. The defenders presented twenty certificates each for registration, but no more, assigning as a reason for not demanding registration of all their certificates, that the arrangement for the change in the direction had not been carried through, and that they had not confidence in the then directors, who probably might make calls and proceed with the formation of the railway, which the defenders did not consider expedient. At a meeting of the directors held on the 11th of February 1848, a notice was directed to be made, that unless the scrip certificates were sent in for registration before the 25th of that month, the names of the original allottees would be entered on the register as shareholders, in respect that it was necessary that the register should be completed before the second statutory meeting to be held on the 29th, which notice was accordingly given. At the second statutory meeting the seal was affixed to the register of shareholders, and the shares for which the defenders had not transmitted the certificates for registration were registered in the names of the original allottees, without any special demand being made by them for such registration. Against this Drew protested, on the ground that certain scrip sent in for registration had been refused, and also because there was no power by the Act of Parliament to exclude the scrip at any time offered for registration, or to forfeit the same, or register it in the name of the original allottees against the will of the scrip-holder. He also moved that certain vacancies in the direction should be filled up, but an amendment was carried, to the effect that the present directors were sufficient to conduct the affairs of the company. No notice had been given of any intention to make such reduction of the number of directors though required by sec. 85 of the Companies Clauses Consolidation Act, 8 Vict., cap. 17, which was incorporated with the special Act of the company. At the general meeting of 30th August 1848 the seal was again affixed to the register, under protest by Drew, and another division took place with respect to the filling up of two vacancies in the direction.

No call was ever made on the shareholders ; and beyond the original deposit

of £2 per share, no sum was paid by the shareholders in respect of their shares. ^{May 25. 1853.} No property was acquired for the formation of the line, no ground was broken or work done in respect of the formation, and it was ultimately found expedient to abandon the undertaking. ^{Lauder v. Orr and Others.} At a special general meeting held on the 13th December 1848, called for the purpose of considering a draft bill for the dissolution of the company, it was moved by Drew that the scrip-holders should be allowed to take a part in the proceedings; but this motion was negatived, as was also an amendment afterwards made by him, that the shareholders should have a share in the distribution of the funds. An act authorizing the dissolution of the company was passed on the 12th of July 1849, and the rights both of shareholders and scrip-holders were thereby reserved entire, and the directors were required, in the event of any dispute arising with respect to any shares, to pay the amount into a chartered bank.

The object of the present action was to have it declared that the pursuer, as the sole registered owner of certain shares, either as original allottee, or as transferee for the purpose of this action from certain other shareholders registered at the time of transference, and which shares are numbered in respect of the same number of original shares specified in the scrip certificates held by the defenders, was the sole true owner thereof, and that the defenders were not entitled to any portion of the money effeiring to the said shares, and arising from the said original deposit of £2 per share, of which there remains over, after defraying all expenses, the sum of £1, 10s. per share. It was not alleged by the pursuer that any of the shares held by him as original allottee, or afterwards acquired by him, were so held or acquired, either by himself or his authors, in ignorance of the scrip appertaining thereto being held by the defenders. His plea was, that in respect of the registration and legal responsibilities thereby attaching to the registered owner, and in respect of the circumstances in which the defenders objected to the registration of their names, he was entitled to the money remaining over effeiring to the said shares, and that the defenders, in consequence of their conduct, have forfeited their right thereto.

Defences having been lodged, the Lord Ordinary (Robertson) "Finds in point of law, that the said plea is not well founded; that nothing was done by the defenders whereby they forfeited their right to the residue of the deposit on the shares effeiring to the scrip certificates held by them; and that it would be inconsistent with equity and justice to hold that the pursuer, or those in whose right he asserts himself to be as registered owner, and who have already received the price of their shares from the scrip-holders, should also draw the sums of deposit effeiring to those shares in the concern which is now abandoned; and therefore sustains the defences, assolizies the defenders, and decerns: Finds the pursuer liable in expenses," &c.

In a note his Lordship stated, 1. "Where a scrip-holder of shares in a railway company neglects or refuses to register his shares, it becomes absolutely necessary, in order to carry on the concern and to impose calls, to place on the register the name of the original allottee who had signed the Parliamentary contract, and is thus primarily liable in the consequences. As scrip certificates are taken in favour of the bearer, and pass from hand to hand like bank-notes, there are no means of ascertaining who may happen to be possessed

May 25. 1853. of them at any particular time, even if the holders could be compelled, as in a question with the seller of the shares, to have these shares entered in the register in their own names. In the case of *Jackson v. Cocker*, 11th March 1841, 2 Railway Cases, p. 868, it appears to have been held that the vendor of scrip has no such remedy against the holder. It was there observed by the Master of the Rolls that the sale of such certificates is not properly a purchase of shares as in an existing concern. He says, 'the whole argument, as I collect it, is really this: That having possessed himself of this certificate, he must be understood by law to have taken with it an obligation to do all those things by which he may constitute himself a proprietor, by which he shall be bound to indemnify the party from whom he received the certificate from all farther liabilities, and also from past liabilities. Now, then, I come to the real question: whether, upon a transaction of this nature, the Court will raise such a special contract as I have just mentioned? I have listened in vain for any satisfactory reason to convince me that there is such an implied contract in this case. What the plaintiff does is this: he gets a certificate, by which he is told that if he does certain things he will be proprietor. That is the only natural construction which I can give to it. It is expressed with great ambiguity—I should rather expect with studied ambiguity—telling him in effect that if he signs the Parliamentary contract, and executes the subscribers' agreement, and provided the Act of Parliament passes, then under these circumstances he will become a proprietor. All those things must concur before he can become a proprietor.' But whether this be consistent with the decision in the case of *Beckett*, to be afterwards noticed, may be doubted. When a vendee refuses to register, and profits are made of the concern arising from subsequent calls to which he did not contribute, and from the general prosperity of the concern, although he may not be entitled to claim such profits, this seems by no means decisive of the present question.

"2. When the original allottee has been registered against his will, the party to whom he sold the scrip having neglected to do so, and not having been found, or refusing to be registered when found, and the registered (and as in a question with the public, the legal) owner concealing the fact of the previous sale of his scrip, sells his registered shares to a third party purchasing, *bona fide*, on the faith of the register, such purchaser may not be exposed to any latent equity existing in favour of the scrip-holder. He may be in a situation similar to that of the purchaser of heritable property dealing on the faith of the record, and ignorant of a latent back-bond or previous disposition granted by his author. But it was not maintained that any such question arises here. The present pursuer was himself an original allottee of some of the shares in dispute, and knew that he had parted with the scrip denoting these shares and put the price in his pocket, (whether with a premium or not is not very material to the question), and those for whom he holds in trust also knew that there were holders of scrip claiming the very shares they bought from the apparent owner: in other words, entered into the speculation of taking the registered shares, knowing fully that the defenders held the scrip, and thus they became the mere purchasers of a law-suit. They are therefore in no better situation than the original allottee, in so far as any latent equity may be pleadable against him. . . .

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"3. There certainly may exist latent equities between a registered allottee May 25. 1853. who has been placed on the register after having parted with his scrip and received the price thereof, and the scrip-holder who has not come forward. Lauder v. Orr and Others. Take the case of the scrip-holder accidentally failing to register, or being *non valens agere*, and of the allottee getting his name registered at the first meeting behind the back of the scrip-holder, and to his prejudice, and with the view of making a second sale of the same article, it seems hardly possible to maintain that he would not be liable in such a case, at least in reimbursement of the price paid for the scrip so far as realised. The matter of premium may be thrown out of view as not bearing on the present question. The mere circumstance of the allottee getting his name on the register, or being placed there even against his will, in absence of the unknown scrip-holder, could never extinguish all latent equities by such scrip-holder as against him. The case of *Beckett v. Billborough*, February 1850, Jurist, v. 14, part I., page 238, goes a great deal further than this. There a scrip-holder neglected to send in his scrip, not having seen, as he stated, the notices requiring this to be done. The company, in consequence, registered the original allottee, who paid a call, and having obtained the sealed certificate of ownership, afterwards sold the shares at 18s. per share over and above the call, being unable to find the scrip-holder. It was held 'in a suit afterwards brought by the scrip-holder, that the allottee was a trustee of the proceeds of the shares for the plaintiff, and liable as such to account.' It was in this case strongly contended that the plaintiff had occasioned the whole difficulty by his own laches, and that he had no title to equitable relief. But 'Sir James Wigram, V. C., after stating the facts of the case, said he was of opinion, that if the shares in question had not been sold by the defendant, but had remained standing in his name in the company's books, the plaintiff would have been entitled to a decree obliging the defendant to transfer the shares to the plaintiff, and that being so, he thought the Court had jurisdiction to compel the defendant to account for the purchase-money realised by the sale.'

"4. It was contended, however, that in the present case the registration had not taken place, either owing to the mere failure of the defenders to come forward, or from their ignorance of the requisition to register, but, on the contrary, it was said that, in the full knowledge of that requisition, and with the view of avoiding risk, the positive refusal to register purposely occurred. The defenders declined, it was said, to encounter the danger, and yet, when it was past, they insist on the value of the shares of which they, by their wrongful conduct, compelled the pursuer or his constituents to become the registered owners, and to incur all the liabilities attachable to that character.

"But, 1st, even in this view of the case, it may be very much doubted whether such a general principle of equity as that contended for by the pursuer could carry him through. There is no question here as to the profits realized on the deposit or share. The defenders are not demanding any gain. They are seeking mere indemnity. Nor are they asking the pursuer or his constituents to suffer any loss. They are merely requiring, as in an equitable adjustment between vendor and vendee, that the seller shall not pocket the price twice over. A share on which a deposit of L.2 was made having been sold and paid for, and the concern having broken up, L.1, 10s.

May 25. 1858. of that share remains. Shall that sum go to the purchaser, who has paid the price, or be drawn by the seller, who has already received that price? That is the true question of equity between the parties, and nothing connected with profit or loss on the share or deposit seems to affect, directly or indirectly, the solution of such a question. Even if the pursuer could say that by his undertaking the risk, which the scrip-holder wrongfully refused to do, the share or its value was saved from utter wreck, this could only entitle him to a claim of salvage or commission, but surely could not transfer to him the equitable right to the commodity he had sold, or the whole amount saved,—in other words, the whole amount of what remained over of that for which he had already been paid.

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"2d, The defenders never intended to forfeit their claim on the scrip. There is no forfeiture enacted under any of the statutes, of the equitable right of the scrip-holder as against the seller of the scrip, in the event of the former being registered on the failure of the latter to do so, whatever position such scrip-holder so refusing may hold as in a question with the company or with the public. The defenders in this case constantly claimed on their scrip at all the meetings of the company, and whether they were right or wrong in their refusal to be registered at the time, no vendors of the scrip to them could have imagined that they were giving up their claim, or did anything on the faith of such abandonment. It is said that they would not undertake the risk of the concern going on. But it appears very clear that the directors had undertaken to allow four gentlemen of their nomination to be placed in the direction, and that this was not done. Whether the repudiation of that arrangement legally justified the defenders in refusing to register, may perhaps be doubted. But the question of equity as to the distribution of what remains over is not affected by that matter; for nothing was done by the pursuer on the faith of any presumed forfeiture by the defenders, and in place of an express forfeiture on their part there was a continued assertion of right.

"3d, And lastly on this head. There truly was no risk incurred by the pursuer, and just as little avoided by the defenders. The whole concern, if not a bubble scheme at first, plainly was one which at a very early period shewed strong symptoms of never being carried into effect. The struggle between the parties was at last who should have the remains of the deposited money, and indeed this was the only substantial question which seems to have occurred in the history of this railway. All the squabbling about the nomination of directors, and the right of scrip-holders to vote, seems to have been subordinate to the question of the division of the spoil. The new purchasers of the registered stock, not original allottees, bought their chance of getting a share of the deposit. The scrip-holders continued to assert their right to such share. The concern never was set agoing, nor any land acquired for its formation. The railway never existed but upon paper. . . . It humbly appears to the Lord Ordinary that injustice would have been done had the door been closed against the latent equities of the scrip-holder. These equities have not to be carried through by a difficult and intricate path, as against shareholders who have paid up calls and incurred liabilities touching an established railway, or where calculations of profit and loss are necessary, far less against *bona fide* transferees ignorant of the sale. On the contrary, the claim

is preferred directly as between the vendor and vendee of the scrip upon the May 25. 1853. balance of the deposited money in a concern which proved abortive."

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The pursuer reclaimed, for whom,—

Pattison, and *Neaves*, referred to *Prendergast*, 18 Law Journal, Chancery Reports, p. 268; *Ross v. East Lothian Central Railway Co.*, 13th June 1848; *East Lothian Central Railway Co. v. Peffers*, 20th June 1849.

E. S. Gordon, and *Dean of Faculty*, for respondents.

The LORD PRESIDENT. The progress of joint stock companies, and especially of railway companies, has given rise to new kinds of property—new relations of parties—new rights and liabilities—and consequently new questions, some of which are difficult of explication. The present is such a question.

The circumstances that appear to be of importance are these:—1st, That at the proper period for making up the register of shareholders in terms of the Act of Parliament, the defenders failed to bring forward their scrip and get themselves registered as shareholders, although called upon by advertisement and otherwise to do so, under certification that unless they came forward they would be foreclosed. 2d, That by this conduct on the part of the defenders, the pursuer, although he had sold his scrip, was as an original allottee liable to have his name inserted in the register as a shareholder, and that he was registered accordingly, and being thus forced into the position of a registered shareholder was subject to all the liabilities of a shareholder; while the defenders by lying out unregistered were not subject to any such liabilities, and must be held to have abandoned or lost their position as shareholders. 3d, It is said that the relative rights and liabilities of the original allottees and the scrip-holders were brought to the test of actual decision in the process of suspension at the instance of Mr Ross, and a process of declarator against him in 1848-9. In regard to these cases, however, I must say that while I perfectly concur in the decisions there pronounced, it does not appear to me that the decision in either of them is of much importance with reference to the present case. In the suspension case, Mr Ross, the scrip-holder, while he would not himself come forward to be registered, called upon the Court to interpose to prevent the company from putting the allottees into the position of registered partners—that is, to strangle the infant company. Again, in the declarator no appearance was made for the scrip-holder, the litigation was entirely between the company and the allottees, who wished to shake themselves free of their obligations to the company. Their rights or liabilities as in a question with the scrip-holder were not decided, but were expressly reserved. I therefore do not think that these cases have much bearing on the present case. But the other considerations which I have referred to appear to constitute the strength of the pursuer's case. In considering that case, it must be remembered that the contract or conditions, expressed or implied, between the pursuer and his associates by reason of his becoming an allottee of shares is one thing: That the contract or conditions, express or implied, between the pursuer and the defenders by reason of his transferring to them his scrip is a different thing: That the rights which the defenders acquired as against the company by reason of their becoming holders of that

May 25. 1853. scrip is a third thing : What liabilities they thereby incurred to the company, or whether they incurred any liabilities to the company, is a fourth thing, and which it is fortunately not necessary for us now to decide. There is no question here between any party and the company. The question is entirely between the pursuer, the seller of the scrip, and the defenders, the purchasers of it from him. As between these parties I have not been able to see any sufficient ground in law, either statute law or common law, for holding that the defenders by failing to come forward and assume the character of registered shareholders at what is called the proper time, forfeited in favour of the pursuer all the rights they acquired against him as purchaser of his scrip. There is no such forfeiture or consequence declared in any of the statutes. The company had no power to create such a forfeiture—neither had the pursuer. The defenders may have lost the opportunity of getting themselves registered *de plano* in virtue of their scrip certificates, and it may have become necessary for them to complete their title or to vindicate their rights in another form than merely calling on the company to register them. The pursuer may have been placed in a position which entitled or compelled him to go upon the register, from whence he could not be displaced or relieved except by the statutory form of transfer. But the rights and remedies of the defenders against the pursuer at common law were not thereby totally excluded or extinguished. They could still have enforced their rights against him and have compelled him to give full implement of his contract so as to be effectual—they on the other hand relieving him from all the consequences, if any, resulting from their remissness. It may or may not be possible that in consequence of the remissness or wilful abstinence of the scrip-holder, a case might arise of such embarrassment and complication as to render it impossible to give effect to his tardy demands without inflicting grievous loss or injury on the original allottee. I do not know whether such a case could arise. But that is not the position of the present parties. Their position is simple and easy of explication without doing injustice to either of them. It is free from all embarrassment as to the rights of the company—or as to the making of transfers—or the substituting of one party for another on the register. Neither is there any question as to calls paid or as to profits or funds created by the enterprise or risk or credit of the pursuer. The fund in question is part of the identical fund which existed when the pursuer sold his scrip to the defenders, and which by that sale he made over to them to the extent of his interest in it. Having received the price from them he cannot insist on retaining the subject to their prejudice, and also retaining the price, unless it could be shewn that they had forfeited in his favour the right which they once had. That has not been shewn on any ground of law or equity satisfactory to my mind. I am therefore for adhering.

LORD FULLERTON. This is a very peculiar case, and I have found great difficulty indeed in arriving at the conclusion sanctioned by the interlocutor of the Lord Ordinary. On a full consideration of the question, it rather appears to me that the claim of the pursuer ought to be sustained. But the determination of the point in dispute requires a very careful consideration of the rather unusual competition which has arisen between these parties. The principles with which we have to deal in determining this case are of a two-

fold kind. The nature of the case depends to a certain extent on the statutes referred to; but the special relative situation of the parties is one unprovided for by the statutes, so that their respective rights and obligations must be explicated by the rules of common law. There is no doubt, that according to the letter of the statutes applicable to the case, the pursuer, as holding right under the register of the company, to the whole shares of the concern forming the subject of dispute, is the only party entitled to claim the proportion of the subscribed sums applicable to these shares, and that the defenders though scrip-holders, being scrip-holders unregistered, have no such right. The situation of these scrip-holders is an anomalous one. They are transferees of the rights and obligations of the partnership, by transactions entered into before the passing of the Act embodying the company. Those transactions are vouched by what are called scrip certificates, which however, do not of themselves render the holders partners of the company; they are blank, and do not in any way identify the holders, and they operate merely by conferring a right on them to take the proper steps for vesting themselves with that character. That can be done only by presenting the scrip certificate in the proper quarter, and getting the scrip-holder's name for the time entered in the register of shareholders. In the meantime however, these certificates pass from hand to hand, and the right of partnership under them is properly vested only by the being entered in the register.

In discussing the question, the defenders are naturally inclined to take a very simple, and what is, at first sight, a plausible view of the relative situation of parties. It is said, that though the original allottees or subscribers advanced the deposit of L.2 per share, they must be held to have been fully reimbursed by the price at which they parted with their shares to the scrip-holders; and that these scrip-holders, now represented by the defenders, having paid that price, are entitled, in equity as well as law, to exclude the original allottees from all participation in the outstanding balance of the deposits. But this is a very coarse and superficial view of the facts of the case. It is true the deposits were made by the original allottees, but the remaining part of the above statement is entirely arbitrary. In the *first* place, it may be true, that the allottees on selling their shares, got a price, which, in the circumstances, they considered it prudent to take. But whether that was enough to reimburse them for the amount of the deposits is a matter in which we are entirely in the dark. We know nothing, and have no means of knowing the terms on which these original allottees sold. But *secondly*, the prices, whether equivalent to the reimbursement of the original deposits or not, were certainly not paid by the defenders. It is nowhere said in the record that these defenders dealt directly with the pursuer in acquiring the scrip, or who the parties were with whom they did deal. The record is equally a blank in another matter of equal importance according to this view:—viz., the price actually paid by these scrip-holders, the defenders in the present action. They no doubt state that they purchased these scrip certificates or shares for greatly more than their value. But if anything is to be rested on the price actually paid by the defenders, this vague statement is evidently inadmissible. They must mention what they did pay; and besides, they must specify to whom they paid it. If they did not pay it to the pursuer, or to any one from whom the pursuer could take benefit, the fact of payment can raise no ground

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May 25. 1858. in equity affecting the rights of the pursuer in the present action. It does not then appear to me that we can reach any very satisfactory conclusion by this summary mode of dealing with the case.

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On the contrary, I think we must look narrowly into the facts of the case, and the relative situation of the parties thence arising, and by them and them alone the present question must be decided. The original allottees now represented by the present pursuer, no doubt agreed to part with their shares; which, by transmission in the form of scrip certificates, have come into the persons of the defenders. But what is the situation of these scrip-holders? They are not partners, have no rights in the company stock till they are registered, and the effect of their being registered is the complete substitution of them for their predecessors, and the complete relief of these predecessors from all claims and liabilities on behalf of the company. When a party then acquires right to a scrip certificate, it appears to me to be entirely a mistake to state that the only consideration he undertakes is the payment of the price to the party from whom he acquires the blank certificate. On the contrary, there is another and most important consideration available to the original allottee, viz., the obligation to relieve that original allottee, by producing his certificate for registration, when that is called for in proper form. The subject which he acquires is a share of a partnership, with all its benefits, no doubt, on the one side, but with all its liabilities on the other; and if he absolutely repudiates that consideration, and refuses to relieve the original allottee, and if that original allottee (after due tender to the scrip-holder) is forced by the company to incur all the company liabilities, by registering in his own name, I think that the original allottee is fairly entitled, according to the ordinary rules of the common law, to hold the rights of the scrip-holder at an end. Now, these are the circumstances in which the parties have been relatively placed by the proceedings which took place in 1848 and 1849.

The notice to register scrip not having been attended to, and these scrip-holders positively refusing to produce their certificates, and to register, and that upon the ground, openly stated, of the risk which they might thence incur, the shares were registered in the names of the original allottees. What is more, the legality of these proceedings was confirmed by the judgments of the Court in the action of declarator, in which both the present pursuer, as original allottee, and Mr Bethune Ross, as a scrip-holder, were called; the judgment being, 1st, That the original allottees were bound, both by the agreement and the statute afterwards passed, to register the shares for which they had obtained scrip certificates; and, 2d, That Bethune Ross, a party into whose hands scrip certificates had come, was not entitled now to insist on registration in his own name, or state the registration of the other defenders, i. e., the original allottees, in respect Mr Ross had not presented the scrip certificates to the railway company for registration *debito tempore*. Now, after these proceedings and those judgments, I really cannot see how the defenders, the scrip-holders, have any claim whatever to any part of the company fund in competition with the pursuer, as representing the registered allottees. I have already explained, that in my opinion, it is entirely a mistake to represent this as an attempt, on the part of these allottees, to annul the purchase of the shares made by the scrip-

holders. Though there may be no positive right created in favour of the allottees to annul those purchases, they have undoubtedly a right to call on the purchasers to say whether they stand by the transaction or not. For, as already explained, the allottees, notwithstanding the passing of the scrip from hand to hand, still have a remaining right, and that an essential one, to call on the scrip-holders to make themselves partners of the company by registering. It is true they may not have the right to compel them to register; but, if that be so, then, for that very reason, the allottees must, on every principle of equity, have the right to demand of the scrip-holders whether or not they choose to stand by their obligation, *i. e.*, whether they choose to register or not, and if they do not, and thus subject the allottees to that necessity, for there is no doubt that the company may compel these allottees, failing the appearance of the scrip-holders; and if they thus finally reject the transaction, I think we must hold their rights in competition with the allottees to be at an end. It seems to me impossible to listen in a case like this to the suggestions of equity. The application of such considerations must always rest on the special circumstances of each case. But here we know and can know nothing of those circumstances. We do not know the parties to whom the original allottees sold, or the price they got. Then we do not know the parties from whom the defenders purchased, and what they paid. We cannot accept the vague statement that the defenders paid a high price. They do not explain what they paid. It may be that they paid little or nothing, and have thus no equitable claim whatever. But we cannot go into this in the present action. The only question here is, which of the two parties is entitled to take the balance of the deposits, forming the whole stock of the company? and for the reasons above assigned, I think that this question ought to be decided in favour of the pursuer, and consequently, that the Lord Ordinary's interlocutor ought to be altered.

LORD IVORY concurred with the Lords President and Ordinary.

The COURT, by a majority, "adhere," with additional expenses.

Henry Tod, W.S., Pursuer's Agent.

Wotherspoon and Mack, S.S.C., Defenders' Agents. (J. S. M.)

FERGUSON v. MURRAY AND OTHERS.

No. 196.

Trust—Lapsing—Curator bonis—Judicial Factor—Mails and Duties—Heritable Security.
—Where a trust had lapsed and a *curator bonis* had been appointed by the Court to collect the rents and manage the estate for behoof and on application of the beneficiaries *Held*, that the estate was not thereby placed in *manibus curie* to the effect of barring an heritable creditor of the truster from entering into possession by action of mails and duties.

This case was verbally reported by Lord Anderson. The question related to the extent of the powers of a *curator bonis*. The late Lieutenant Robertson executed a trust for securing a liferent of his estate to his sister as a purely alimentary provision, exclusive of the *jus mariti*; the fee of the estate was to vest in her children. In consequence of the failure of the trustees, and the exclusion of the *jus mariti*, it became necessary on the death of Robertson to appoint some person to manage the property and collect the rents. The present defender was in 1844 appointed *curator bonis* on the property in the usual way, on the application of the beneficiaries.

May 25. 1853.

Lauder v. Orr
and Others.

1st Division.

May 27. 1853.

Ferguson v.
Murray, &c.

May 27. 1853. In 1832 Robertson granted a bond for L.1500 over his property, which consisted chiefly of house property in Edinburgh. That bond has been transferred to the present pursuer Ferguson, who took infestment and raised action of mails and duties, calling as defenders the tenants, and also the *curator bonis*. Defences were lodged for the *curator bonis*, who *inter alia* pleaded that the process was incompetent, as he was the only person entitled to collect the rents.

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Murray, &c.

Monro, and *Dean of Faculty*, for pursuer. This is a family trust. The *curator bonis* was appointed on the application of the beneficiaries, for whom alone he acts. He is a mere judicial factor, and the Court never intended in making such an appointment to interfere with the rights of creditors. This estate therefore is not in *manibus curiæ*. That is effected by sequestration alone. The right of the heritable creditor therefore cannot be defeated; *Robertson v. Ferrier*, 12th December 1833, 12 S. and D., 203; *Beveridge v. Wilson*, 17th January 1829, 7 S., 279; *Simpson v. Graham*, 25th November 1831, 10 S., 66.

Neaves, and *Buchanan*, for defender. The question is, whether the collecting of the rents is within the province of the *curator bonis*? It is his duty to collect the rents and to distribute them for behoof of all concerned; *Key v. Cleugh*, 12th December 1840; *Somerville*, 6th February 1836. He has found caution to collect the rents, and this responsibility will be enforced against him. It is essential, therefore, that he should not allow anything to be removed from his administration for which he may be called to account.

The LORD PRESIDENT. The truster had in 1832 granted a security for L.1500 over the property, and it now appears that the party in right of that security seeks to enter into possession by mails and duties, and the question is, whether the holder of that security is entitled to enter into possession by mails and duties? Now, there can be no doubt that if this trust had subsisted and been preserved alive, there could be no doubt of his right to do so. But it has become inoperative, and a person has been appointed to collect the rents in that emergency. The question is, does that person exclude the heritable creditor of the original truster from making good his right at common law? I do not see that the right of the creditor is excluded. It is not sound to say that because the person collecting the rents is a person appointed by the Court, that therefore that excludes all diligence of creditors with regard to collecting rents. We must look to the nature and object of the appointment. It may be true that this person is bound to pay the rents to the creditors and others having right to them according to their preferences; and if he raised a multiplepoinding and brought forward all parties interested, the holder of the heritable security might get a preference. But it does not follow that the heritable creditor is therefore excluded from making good his right in the way contended for. The *dicta* in *Key's* case appears at first reading to be very broad, but we must read them with reference to that case alone. Now, that case was materially different from this one. There the question arose between the heritable creditors themselves; and the Court, to meet that emergency, appointed a judicial factor, which was substantially a sequestration of the rents. Now this is an appointment for behoof of the beneficiaries, and does not bear to go further.

LORD FULLERTON. I entirely concur with you Lordship. To say that an officer appointed by this Court, no matter how limited his appointment, is to be entitled to exclude every one from the rents, is a doctrine for which there is no authority. May 27. 1853.
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Murray, &c.

LORD IVORY. I am of the same opinion. If the appointment of a judicial factor be made with regard to the lapse of a trust the measure of the factor's right is exactly the same as that of the trustee would have been had the trust subsisted. I rather think the name here is a slip, but I think it must be taken as synonymous with judicial factor.

Ferguson & Stuart, W.S., Pursuer's Agents.

John Cullen, W.S., Defenders' Agent.

(J. S. M.)

CAMPBELL v. MYLES (HORSBURGH'S TRUSTEE.)

No. 197.

Bankruptcy—Sequestration, recall of—2d and 3d Vict. cap. 41, §§ 9 and 23—Affidavit—Concurring Creditor—Principal and Agent—Banking Company.—A bill specially indorsed to "the British Linen Company or order," having come into the hands of a local agent for that bank, he in respect thereof became concurring creditor in petition for sequestration of the acceptor, and stated in his affidavit that the debt was owing to him in his character of agent. In petition for recall of the sequestration, *Held*, that the affidavit was bad, in respect the deponent had no legal title to the bill in his own person, and was not such "principal officer" of the bank as could make affidavit under the statute.—Sequestration accordingly recalled, although another creditor had sided himself as concurring in room of the former, and although the general body of creditors were willing and anxious to adopt the proceedings.

In 1852 the estates of Horsburgh were sequestrated on his own petition, 2d Division.
"with concurrence of John Symers, banker, Dundee, agent for and on behalf May 27. 1853.
of the British Linen Company at Dundee, a creditor of the said James Gordon
Horsburgh to the amount required by law." His affidavit bore, "Com- Campbell v.
Myles.
appeared John Symers, banker, Dundee, agent for and on behalf of the British
Linen Company at Dundee, who . . . depones, that James Gordon
Horsburgh, corn-merchant, Dundee, is justly indebted and resting-owing to
deponent, as agent foresaid, the sum of £95 sterling, being the principal con-
tained in a bill drawn by John Crichton . . . upon and accepted by the
said James Gordon Horsburgh . . . indorsed by the said John Crichton
to the said British Linen Company or order, and delivered by him to and
held by deponent as their agent." This was petition at the instance of
Campbell for recall of Horsburgh's sequestration, as awarded without the
statutory concurrence by reason of Symers's affidavit being exposed to the
fatal objections specified below. A minute of compareance was lodged for
Webster, another of the creditors, wherein he stated "his concurrence in the
sequestration of Horsburgh's estates, and concurs with the trustee in resist-
ing the petition for recall." The trustee moreover alleged, that the whole
body of creditors supported the sequestration, and were anxious that it should
continue in force.

The Lord Ordinary (Curriehill), "sustains the objections . . . and
therefore recalls the sequestration; finds the petitioner entitled to expenses,"
&c.

May 27. 1858. *G. Patton* now supported a reclaiming note for the trustee. The bill came into the hands of Symers as local representative of the bank in a purely local transaction, and it cannot be doubted that he had power to receive payment and to discharge the obligants. This is the criterion of his being entitled to take the oath as creditor. The statute in sec. 9 intends merely to afford facilities, and not to define who alone are to make affidavit, to the exclusion of those who are otherwise entitled to do so. The affidavit further differs from that in *Anderson's* case, inasmuch as it brings anxiously out that connection of the bank agent with the transaction which put him in the position of creditor. But, at all events, the concurrence of Webster *pendente lite* is available under sec. 23 of the statute to support the sequestration; *Lockhart v. Mitchell*, 12th July 1849; and it has further been held, that though the original concurrence be inept, the fact that all the bankrupt's creditors adopt the sequestration, is of itself sufficient to keep it in force; *M'Nab v. Hunter*, 13th Dec. 1851.

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Logan, contra, stated the objections to the affidavit. *Ex facie* of it there is no valid concurrence, for (1.) It states the creditor in the bill to be "The British Linen Company," to whom it was specially indorsed, and deponent to be merely their local agent. That a local agent cannot take the oath of verity is matter of express legislation and decision; see sec. 9 of Bankrupt Act, which provides that "where the creditor is a body corporate, an oath of verity made by the manager, cashier, secretary, clerk, or other principal officer of such body corporate, shall be sufficient;" *Anderson v. Monteith*, 7th July 1847. The case would have been different had the *jus exigendi* been vested in the agent by indorsation to him; *Bonar v. Liddell*, 9th March 1841; *Wison v. Deans*, 22d June 1849. (2.) It states the party to whom the debt was owing to be deponent *himself*, whereas it was the British Linen Company. Sec. 23 of the statute is not in point, for it allows proceedings in a sequestration to be followed out by any other creditor, in three cases only, viz., where the petitioning creditor "shall withdraw, or become bankrupt, or die." *M'Nab's* case does not establish the doctrine contended for by the reclaimer, for there the decision went on the ground that the concurring creditor's affidavit was *ex facie* perfectly regular, and though he was at the time an undischarged bankrupt, he had never been divested of his estate by confirmation of the trustee.

THE LORD JUSTICE-CLERK. I agree with the interlocutor. So far as practice goes it is all against what was done here. Where a bill is endorsed to a bank, and the bank means its agent to take the oath, the practice is universal to re-transfer the bill to the agent. The plea on the intention of § 9 of the statute, besides being a desperate one, could not avail in this case where the party has no legal title to the debt. That the bill was "delivered to and held by the deponent as agent" for the bank, the last indorsee, is not the statement of any title to it. It may be true that a local agent may receive payment and discharge the debtor, but to give him a right to such a bill, it must be transferred to him; he then becomes responsible to the bank for the debt, and is, as creditor, entitled to take the oath. We cannot sustain a statutory sequestration if not taken out according to the statutory rules, because the body of

creditors concur to support it as an arrangement beneficial for the estate. In May 27. 1858. *M'Nab's* case the concurrence was good under the statute in point of form.

LORDS COCKBURN and MURRAY concurred.

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LORD WOOD. If the affidavit be construed as setting forth the debt as due to Symers, then, taking it along with the bill, he is not creditor, for there is a special indorsation to the British Linen Company. If it be construed as setting forth a debt due to the bank, then Symers is not the proper officer who can, under the statute, take the oath. This sequestration cannot be validated by any after-concurrence.

The COURT "adhere," with additional expenses.

S. & P. S. Beveridge, S.S.C.

Isaac Anderson, S.S.C.

(J. M. M.)

WALLACES competing with DAVIES AND CHAMBRES.

No. 198.

IN MULTIPLEPOINDING, GOALEN v. GOALEN.*

Assignment—Intimation.—1. Circumstances in which held that an assignment had been sufficiently intimated; and assignee preferred to posterior arresters. 2. Held that an assignment of the cedent's share under his father's settlement was good, even in a competition, to give the assignee a title to a sum which the cedent had agreed to take from the other beneficiary as the value of his interest in the succession.

This was an action of multiplepoinding raised in the following circumstances:—The late Mr Goalen of Starbank died in 1851, leaving a settlement, by which he gave the whole of his property to his two sons; one, the Rev. W. M. Goalen, pursuer and real raiser, who is domiciled in this country; the other, Thomas Goalen, who is domiciled in England. They both confirmed as executors, but the former alone intromitted and acted. Thereafter, but before September 1851, they concluded an arrangement by which they adjusted the value of the succession, W. M. Goalen agreeing to take the whole of his father's estate, and to pay down to Thomas a certain sum of money. It is this sum which formed the fund *in medio*. On 23d December 1851 Thomas executed a deed of assignment in England, in the English form, in favour of Davies and Chambres, as trustees for certain of his creditors. It assigns "the share and beneficial interest to which Thomas Goalen now is or shall become entitled, of and in the . . . estate, &c. of the said Alexander Goalen deceased, and all sums of money . . . which now are or shall at any time hereafter become due and payable to, or coming to the said Thomas Goalen, under or by virtue or in pursuance of the said will or settlement, and all the estate and interest of him . . . under or by virtue of the said will." On 30th December the solicitors of the assignees wrote to W. M. Goalen as follows,—“We beg to inform you that your brother Mr Thomas Goalen, by indenture of assignment bearing date the 23d day of December 1851, transferred and conveyed the whole of his claim and interest under the will and family settlement of your late father to Mr William Davies and Mr W. C. Chambres to secure certain debts,” &c. The letter then proceeded to require an immediate amicable settlement of

* An important point of international law was decided by the Lord Ordinary in this case; but the Court found it unnecessary to pass any opinion upon it. The Lord Ordinary's note will, if space permit, be given in an appendix.

May 27. 1853. Thomas Goalen's share of the succession, under threat of legal proceedings. To this letter the following answer was returned, upon 1st January 1852, by W. M. Goalen's agents,—“The Rev. Mr Goalen has put your letter of 30th ult. into our hands. You are evidently unacquainted with the position of matters when you speak of taking proceedings for the sale of all the property comprised in the late Mr Goalen's settlement, and you have a most exaggerated idea of the balance to which Mr Thomas Goalen is entitled. The late Mr Goalen left his whole estate equally between his two sons . . . and after various negotiations an arrangement was entered into between the brothers, under which the properties were valued, and . . . the Rev. Mr Goalen agreed to pay his brother a certain sum for his half of the residue . . . subject to Mr Thomas Goalen's half of the general expense of completing titles to the different properties and of winding up the estate. The titles of several of the properties are already completed, and they would have been all completed some time ago, but for the circumstance that some of the deeds are gone amissing . . . We are endeavouring, however, to get the defects in the title supplied, and the Rev. Mr Goalen will be in a condition very shortly to borrow on the property the sums necessary . . . to settle with his brother or his creditors. The Rev. Mr Goalen will require no compulsitor to do what is incumbent on him under the arrangement with his brother, . . . but of course we will require to see that he gets an effectual conveyance and discharge before he pays over the balance owing by him to his brother; and if you think it necessary to employ an agent here, we shall be ready to communicate with him.” Before any further communication had passed between parties, William Wallace and James Wallace, who were Scotch creditors by bills of Thomas Goalen, used arrestments *jurisdictionis fundandæ causa*, on 24th March 1852, in the hands of W. M. Goalen, and inhibition and arrestment on the day afterwards. W. M. Goalen thereupon brought the present action, in which the claimants were Davies and Chambres on the one hand, and on the other, William Wallace and James Wallace; the former contending for a preference on the ground of the priority of the intimation of their assignment by the letter of 30th December to the execution of the arrestments.

The Lord Ordinary (Rutherford) “repels the claims for William Wallace and James Wallace, and decerns; ranks and prefers the claimants Messrs Davies and Chambres, in terms of their claim to the whole fund *in medio*,” with expenses.

In a note his Lordship observed,—“It is certainly not necessary by the law of Scotland that intimation should be made in strict form by notarial instrument. It is not necessary that it should be made by a notary, nor does the Lord Ordinary observe any case in which it has been held that production of the instrument of assignment to the debtor is necessary. Although the more regular course of intimation may be in some one or other of these ways, the law undoubtedly admits of equivalents; and the Lord Ordinary thinks that a written notice to the debtor, setting forth the assignment in such plain and distinct terms as in the letter of 30th December 1851, and demanding an amicable arrangement . . . or intimating legal proceedings, followed by an answer upon the part of the debtor explaining how the matter

stood, giving more correct information as to the amount of the debt, but ^{May 27. 1853.} stating that no *compulsitor* would be required for settlement, is equivalent to intimation, and is quite as conclusive as a general acknowledgment of debt and promise to pay what should be ascertained to be due—which beyond all doubt would be sufficient. This is not at all the case of mere private knowledge, independently of any distinct intimation of the assignee's right and requisition to settle with him as creditor." His Lordship then referred, as conclusive authorities, to the cases of *Gray v. Duke of Hamilton*, 10th March 1709, Robertson's Appeals, p. 1; and *Earl of Aberdeen v. Earl of March*, 9th April 1730, Craigie and Stewart's Appeals, p. 44.

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Messrs Wallace reclaimed, for whom—

Penney, and *Neaves*, argued, *first*, That assuming the letter of 30th December to be precisely applicable to the debt assigned, still there was here no sufficient intimation by the law of Scotland, and the arresters must be preferred. The law must be strictly applied, this being a case of competition, and it requires something more than mere *certioration* to the debtor of an assignment having taken place. It requires, (where notarial or judicial intimation is not used,) a distinct and unqualified *recognition* by the debtor of the assignee as his creditor, *e. g.*, by a promise or undertaking to pay. This is giving him possession of the right; it is wanting here and nothing short of it will do; Jurid. Styles, ii., 351; Ersk., iii., 5, §§ 3, 4, 5; Stair, iii., 1, §§ 6, 45; and especially Bell's Com., ii., p. 17; *Bain v. M'Millan*, 1679, Dict. 863. But, *secondly*, The assignment and the above letter apply, not to a debt arising out of contract, as this does, but to one arising under a family settlement. This want of specificalness by itself must be fatal to the claim in a competition.

E. S. Gordon, and *Dean of Faculty*, *contra*. All that is required is, that a knowledge of the assignation be clearly brought home to the debtor. There must be *certioration*, and we have it here: there need not be recognition, which would be to make an assignee's safety depend on the debtor's will; *Watson*, Dict., 850; *Hill v. Lindsay*, 12th November 1847.

LORD JUSTICE-CLERK. The objection that this assignment is really not of the sum agreed on between the brothers, which forms the fund *in medio*, is groundless, both according to the letter and character of the deed. The subject-matter assigned is the cedent's right under his father's will. That is his right and title. Now the brothers agreed, in whatever way is not very clearly explained—seemingly not by any regular and formal deeds—that the brother in Scotland, who acted in Scotland, and who had to collect the funds and estate of the deceased, should pay a fixed sum as the full value of the cedent's share of the succession, to one half of which he had right under the father's settlement. But though this arrangement fixed the sum which the real raiser was to pay, yet the cedent's right and his title arose out of and was founded upon the father's settlement, and the sum to be paid was his share, such as he had adjusted it, of his father's succession. It is said that this sum was adjusted in a correspondence between the brothers, which it has not been necessary for us to see. Whether that correspondence would have founded any separate right of action independent of the

May 27. 1853. father's settlement, it is unnecessary to inquire, for clear it is that the cedent's right and title is really his father's settlement, the correspondence relating only to the sum which is to be paid to him under and in virtue of it ; and that such is the true character both of his right and his title is clear from this, that he had accepted the office of executor, which brought the whole executry as well as his own share directly under that title, although he left to his brother in Scotland to intromit and act. Whether the assignee's agents, when they wrote their letter of 30th December 1851, knew of the arrangement for fixing the sum to be paid to the cedent, or whether that arrangement was then completed and adjusted, or at least the sum ascertained, is of no moment. The cedent's claim and interest is stated to be assigned, and the direct and immediate, and most effectual and formal method of enforcing the claim was to proceed under the father's settlement, which was the cedent's regular title, of the full benefit and use of which, if there was delay or difficulty, he was in no degree deprived by any correspondence for settling the amount of his claim, supposing such correspondence and agreement was completed or carried through in any formal shape. Hence the intimation of what was to be done was directly applicable to the case, and an appropriate course for the assignees. It is true, they might have been prevented from claiming more than the sum which the cedent had agreed to take, and that such agreement might bar them from insisting on any sale, and they may have pointed in this letter to claims greater in amount than they could enforce, or to proceedings which it might no longer be competent to adopt. But the communication does not the less intimate, that the brother had transferred his whole claim, whatever it was, to the parties for whom the communication was made, and that the full amount now belonged to them. The letter is explicit and full on that, the material and important matter of which to give notice to the holder of the fund. Then how is this dealt with? The brother's agents write a letter in reply, which letter of course is of equal effect as if it had been written by the real raiser himself. That a copy of the assignation was not sent to him is of no importance, if the deed is distinctly referred to, for to him the terms of it might be immaterial, except with a view to the discharge to be granted to him, and if he did not ask for the deed, the assignees had no occasion to do more at that time than to intimate its date and contents, in order to complete the title given them by the assignation. The answer is complete proof that the assignation was made known to, and intimated to the holder of the fund, and that is the main use of it. I am far from being prepared to say that an answer to a distinct written intimation of an assignation is necessary, if such written intimation is sufficiently established by recovery of the original or otherwise, for I am not disposed to hold that the efficacy and sufficiency of the communication, by which an assignation is intimated, depends on the reply or acknowledgment by the party to whom it is made. But this letter really superseded the necessity of anything else being done by the assignees, who, after receiving it, were entitled to rely on the sufficiency of the communication by which they had intimated their assignation. It has been contended that if an assignation is intimated by letter, it is necessary that the debtor should make in answer a distinct promise to pay to the assignee in order to make such a mode of intimation effectual

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in law for the assignee's preference. I do not recognize any such doctrine, May 27. 1853.
 and the expressions founded upon are really stating what are the facts in
 other cases, but do not establish that such an answer was necessary in point Goalen v.
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 of law. In this case it is clear, however, that the answer does acknowledge
 the interpellation. That the deed might require to be examined with a view
 to the discharge which the holder of the fund might be entitled to require, is
 another point altogether; but that very reservation only the more proves
 that the intimation of the assignation was acknowledged as complete, since
 that ultimate point is the only thing which is reserved for future examination.
 I am of opinion, therefore, that the assignation founded on was effectually
 intimated before the arrestments, and that the interlocutor is right.

LORDS COCKBURN and MURRAY concurred.

LORD WOOD. I concur. The letter of 30th December 1851, is in my
 opinion a sufficient notification of the assignees' being in right of all claims
 Goalen might have under the settlement, whether as standing simply on the
 settlement, or whatever form it might have taken by arrangement between
 the parties, but being still truly his interest under the settlement as adjusted.
 This letter, too, puts aside all question as to the effect of private knowledge,
 generally so called, or even of knowledge by communings with the assignee.
 For it is a direct intimation by the assignees of the deed of assignment by
 date and mention generally of its import as a deed of transference. It is also
 in substance a direct requisition and claim by the assignees as in right of that
 interest, and notice that they are to be held as the parties having by the
 assignation the full legal title thereto, and are to insist in and enforce the
 same, whatever that interest may be. Now, while in the circumstances of
 this case, it is not necessary to determine whether this letter was or was not
 sufficient *per se* to complete the assignee's right, I should not wish it to be
 understood that I had any opinion that more was necessary. That question
 is here superseded by the answer of 1st January 1852, by the agents of the
 debtor in the claim which, by the arrangement that had been made, the
 cedent had against him under their father's settlement. It acknowledges
 receipt of the intimation by the Rev. Mr Goalen; and its import is, that while
 he readily acquiesces in the demand, that Thomas's assignees shall receive the
 benefit of all his interest under his father's settlement, as standing on the
 arrangement of parties, he shall before performance have satisfactory evidence
 of the sufficiency of the title. This I think is equal to an express provision,
 (if that were necessary, which I do not admit) made in answer to the intima-
 tion of the assignment, to pay or perform to the assignees all that they could
 claim as in right of Thomas's interest under his father's settlement, and if so,
 then it does not admit of dispute that such an answer and undertaking to
 an intimation by an assignee of a deed in his favour is sufficient to complete
 the right.

The Court "Adhere" with additional expenses.

Grant and Wallace, W.S., Reclaimers' Agents.

C. & G. Baxter, W.S., Agents for Davies and Chambres.

(J. M. M.)

No. 199.

SMITH v. NICHOLSON and OTHERS.

Act 1696, c. 32—Act of Grace—6 Geo. IV., c. 62—Aliment—Liberation—Action of Damages—Relevancy.—A party imprisoned *ad factum præstandum* applied to the magistrates for aliment under the Act of Grace and 6 Geo. IV., and ultimately obtained liberation. An action of damages was brought by the incarcerating creditor against the magistrates, on the ground that the liberation was illegal, in respect the statute did not apply to the case of a party imprisoned *ad factum præstandum*:—*Held*, that no allegation of irregularity in the proceedings being averred, there was no relevant ground of action.

1st Division. This was an action of damages raised under the following circumstances:—
 June 1. 1853. The pursuer, William Smith, is the grandson and heir-at-law of William Smith, senior, in whose favour a feu-disposition, dated 11th September 1792, had been granted by John Ferguson of Caitloch. William Smith died on the 8th of January 1842 uninfest. He had lived for several years with the late Gilbert Smith and his wife Mary Dixon, and it was averred that on the 1st of January 1834, he entered into an agreement with Gilbert Smith, by which he sold the subjects embraced within the feu-disposition, in consideration of the sums advanced and due by him for his support for several years previous, and of an obligation for that support during the rest of his life. William Smith, junior, raised an action of exhibition *ad deliberandum* of the said feu-disposition against Mary Dixon, and obtained decree on 6th November 1849, and the defender having been apprehended on the 3d day of January 1850, the deed appears to have been exhibited and a copy taken. In March 1850 an action was raised concluding for delivery of the deed and expenses. The Sheriff on the 5th November 1850 pronounced decree, ordaining the defender to deliver up the feu-disposition, and found expenses due. These expenses were afterwards modified at the sum of L.7 : 8 : 6, and the decree was extracted. A charge having been given on the decree *for delivery of the deed only*, and not for expenses, that charge expired on the 5th of May 1851, on which day a warrant of incarceration was duly granted. That warrant authorises the apprehension and incarceration of Mary Dixon, until she deliver up the feu-disposition specified. She was accordingly incarcerated in the jail of Dumfries on the 7th of May, and at the same time the sum of ten shillings was lodged for her aliment.

On the 9th of September 1851, an application for liberation was presented to the magistrates of Dumfries, founded on the Act 1696, c. 32, (Act of Grace), and 6 Geo. IV., c. 62. In this petition Mary Dixon expressly stated that it was impossible for her to deliver up the disposition, not being in possession of it—that at no period was it within her power, and that she had no means of alimentering herself in jail. On 9th September a remit was made to the clerk to take the petitioner's oath. The agent for the incarcerating creditor received notice of this application, and the town-clerk on the 11th sent formal notice that the examination was to proceed on the 13th. Neither Smith nor his agent attended, and on the 13th Mary Dixon expressly swore that at no period subsequent to the date of her imprisonment was the disposition in her possession or subject to her control, and that she had lent it about a year and a half before to her daughter-in-law, Mary Wallace, to shew her agent, and that although she applied to have it returned she had

never seen it since. She farther swore she had no means of alimentering her- June 1. 1853.
 self in jail. The magistrates on the 16th of September modified an aliment,
 and appointed the proceedings to be intimated to the incarcerating creditor,
 with certification that if an aliment was not lodged within ten days she would
 be set at liberty. This intimation was accordingly made, and on the 26th a
 condescendence and protest was lodged on behalf of Smith, in which it was
 maintained that the statute did not apply to an incarceration *ad factum præ-*
standum, and that the magistrates would be liable in damages if they granted
 liberation. A certificate that the aliment was exhausted having been pro-
 duced under the hands of the jailor, warrant of liberation was granted on the
 10th of October 1851, and the party set at liberty. The present action of
 damages was accordingly raised against the magistrates and jailor, on the
 ground that the liberation of Mary Dixon was illegal. Smith v.
Nicholson, &c.

The Lord Ordinary (Robertson), "in respect that the warrant of liberation
 was legal and regular under the circumstances, the imprisonment of the party
 being for a civil cause, to which the Act 1696, c. 32 applies, sustains the
 defence to that effect, Finds no relevant ground of action has been conde-
 scended on, and therefore assoilzies the defenders, and decerns: Finds the
 pursuer liable in expenses, and remits the account thereof, when lodged, to
 the Auditor, to tax and to report."

The pursuer reclaimed.

Maidment, for reclaimer. There is express authority deciding the abstract
 point that the benefit of the Act of Grace does not extend to prisoners incar-
 cerated on a decree *ad factum præstandum*; Bell's Com., 2, p. 555; *Turner v.*
Ross, 2d December 1707, M. 11,802; *Will v. Urquhart*, 5th January 1754, M.
 11,810; see also Opinion of Lord Glenlee in *Edwards v. The Physicians of*
Glasgow, 11th July 1818, F. C.

Young, and *Dean of Faculty*, for respondents. The action is incompetent.
 Magistrates are not jailors and liable for the aliment, discipline, or escape of
 their prisoners; 2 and 3 Vict., c. 42, § 18. In granting this warrant of libe-
 ration they may have pronounced a wrong judgment in point of law, but they
 are not liable to an action of damages on that account any more than a court
 of review. Besides, the judgment in this case was sound.

The LORD PRESIDENT. I am very strongly impressed with the notion that
 there is no ground for an action of damages in any view of the case. I have
 no doubt that this person being desirous to take the benefit of the Act of
 Grace and of the 6 Geo. IV. adopted the proper course for bringing her claim
 to a decision by presenting her petition to the magistrates, and I think they
 were the parties to decide the case in the first instance, and to decide whether
 it was within the statute or not—whether it was a civil matter or whether it
 was a criminal. It might be a difficult question to decide, and they may have
 pronounced a wrong judgment; but supposing they have done so, and there is
 no allegation of irregularity in the proceedings, or of anything wrong in the
 motives of the Court that pronounced that judgment, I do not think an action of
 damages will lie. They have decided according to the best of their ability.

LORDS FULLERTON and IVORY concurred.

The COURT pronounced the following interlocutor:—"Find that the pro-

June 1. 1853. *ceedings referred to were instituted before the Court of the Magistrates of Dumfries, which was the proper tribunal for disposing of the question of Mary Dixon's claim for aliment under the Acts 1696, chap. 32, and 6 of Geo. IV. chap. 62; That there is no allegation of irregularity in the proceedings, and that the ground of action maintained by the pursuer resolves into an averment that the judgment of the magistrates sustaining the claim and giving effect to the provisions of the said statutes was not sound in law: Therefore adhere to the interlocutor of the Lord Ordinary so far as it finds that no relevant ground of action has been condoned on, and assoilzie the defenders, and decern: find it unnecessary to dispose of the matter embraced in the other findings of the Lord Ordinary's interlocutor: of new find the defenders entitled to expenses."* &c.

Richard Arthur, S.S.C., Pursuer's Agent.

Brodies & Kennedy, W.S., Defenders' Agents.

(J. S. M.)

No. 200.

FORSYTH'S FACTORY.

Judicial Factor—Curator bonis, removal of.

2d Division. Forsyth, *curator bonis* to L. R. Hoyes, was on 1st February last, found
June 1. 1853. personally liable in the loss sustained by a loan of L.2000; (See *supra*, p. 187,) and decree was granted in name of the Accountant of Court. The Accountant reported to the Lord Ordinary (Curriehill), that the balance due by the curator under the above decree, was L.2361 : 12 : 8, at 21st Dec. 1852; that he was unable to obtain payment of this sum, and that the curator had executed a trust for behoof of his creditors. The Accountant expressed his opinion that as the lunatic possessed other means, it would be injudicious to continue Forsyth longer in the management, and that some other competent party should be appointed.

LORD CURRIEHILL, having reported the circumstances to the Court to-day, The COURT "having resumed consideration of this case, nominate and appoint Mr Robert Urquhart, writer in Forres, to be *curator bonis* to Lewis Robert Hoyes, with the usual powers, he finding caution according to the Act of Sederunt, and decern: Allow extract to go out *ad interim*; and recommend to Mr Urquhart to recover the funds, and take the necessary steps for the safety of the lunatic without delay."

(J. M. M.)

No. 201.

BALLINTEN v. CONNON, AND
CONNON v. BALLINTEN.

Process—Note to Inner House.

2d Division. In each of these cases a printed note had been lodged, narrating the various
June 1. 1853. steps of procedure, which had been very complicated, and moving the Court, in respect of failure to sist a mandatory, to pronounce decree of reduction, &c., in the one case, and of absolvitor in the other.

Ballinten v.
Connon; and
Connon v.
Ballinten.

The LORD JUSTICE-CLERK. A practice is creeping in of putting in long printed or written notes. We cannot allow this, it is just reviving, in an unauthorised shape, argumentative papers. A short written note to me ought to be put in, reserving explanations till the discussion at the bar.

(J. M. M.)

MACPHERSON v. TYTLER & OTHERS.

No. 202.

Process—Expenses, Interest on.—In an action of accounting against executors, a remit was made to an accountant to prepare a state of the executry accounts. The pursuer paid half of the accountant's fee, and afterwards obtained decree in his favour for a large sum with expenses:—*Held*, that he was entitled to recover not only the sum paid by him to the accountant, but also interest thereon from the date at which he advanced it, his outlay being occasioned by the neglect of the defenders in not having kept proper accounts.

In 1835 Miss Macpherson raised action of accounting against the exe-2d Division.
cutors of Macpherson of Belleville, or their representatives. The intromis-June 1. 1853.
sions of these executors began so far back as 1796. The matters under investigation in this action being very complicated, and the accounts very obscure, a remit was made to an accountant. Ultimately, decree was pronounced in favour of Miss Macpherson for about L.20,000, and she was found entitled to the expenses of the accounting. In her account of expenses, she charged the defenders with L.262, 10s., as her proportion of the sum paid to the accountant for his report, and also with L.79 : 16 : 6, being interest at 5 per cent. thereon, from 20th April 1847, the date on which it was paid. This interest the creditor disallowed.

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Tytlar, &c.

Penney, for Miss Macpherson, objected to this finding of the auditor. The expense of making up a proper state of accounts is one which the executors, who were bound to render them correctly, are justly liable to pay. Miss Macpherson in advancing a part, was paying for them, and ought to have interest on her outlay for their behoof. This falls among the equitable exceptions to the rule, that interest is not allowed on expenses till constituted by decree. See 1 Bell's Com. p. 649; *Grote v. Sinclair*, 15th May 1819; *M'Dowall v. M'Dowall*, 8th Dec. 1821.

R. Thomson, contra. This case does not fall among the exceptions. The action was brought at a distance of nearly forty years from Macpherson's death; and the transaction being so old, the accounting must necessarily have been complicated; see *Barclay*, 5th March 1850, Jurist; *Earl of Fife v. Duff*, 3d March 1824; *Pearse v. M'Donell*, 2d March 1825; *Dunlop v. Speir*, 15th Nov. 1825. These cases shew how strong the general rule is. Besides, the proper time for making this claim, was when the merits were settled, and the whole case was in view of the Court.

The LORD JUSTICE-CLERK. The general principle certainly is, that judicial expenses do not bear interest; and I could not have concurred in the decisions in the cases of *Grote* and *M'Dowall*, where interest was allowed on the proper expenses of process. I think there must be *mala fides* shewn in staving off decree before such decisions would again be pronounced. But this case is different, for here Miss Macpherson was compelled to make this outlay, in order to obtain what the executors ought to have prepared, and been ready to produce. This justly falls to be reimbursed to her by the defenders as at the date when she made the advance. Had they performed their duty in keeping proper accounts, there would have been no necessity at all for this action. By allowing interest on her outlay, we do not trench upon the cases which settle that the ordinary expenses of process do not bear interest.

This objection is stated at the proper time. Had we been asked before to

June 1. 1838. allow this, we would have answered that we must first have the accounts before us to shew whether half the fee was really paid by Miss Macphersou.

Macpherson v. Tytler, &c. The other Judges having concurred,—

The COURT sustained the objection; and found interest due.

Gibson-Craig, Dalziel and Brodie, W.S., Agents for Objector.

J. & J. Wright, W.S., and Gordon, Stuart, and Cheyne, W.S., Defenders' Agents.
(J. M. M.)

No. 203.

DUNCAN, PETITIONER.

Process—Appeal—Expenses—Petition to apply Judgment.—Expenses of petition to apply judgment of the House of Lords, affirming that of the Court of Session, Refused.

2d Division. Duncan on 24th January 1851, got decree in the Court of Session for June 1. 1853. L.2000, under certain deductions if instructed, in regard to which parties were appointed to be further heard. A state of deductions was lodged accordingly by the defenders, and followed by objections for the pursuer. Before these papers came to be considered, the defenders lodged an appeal to the House of Lords. The judgment of the Court below was affirmed with costs.

Duncan,
Petitioner.

This was a petition “to apply the judgment of the House of Lords, and to order the case to the roll, that the state of deductions for the defenders and objections thereto for the petitioner may be disposed of, . . . and to find the petitioner entitled to the expenses of this application.”

Judgment was accordingly applied, and the case ordered to the roll. But the Court refused the expenses of the application.

NOTE.—See *Balmanno v. M'Nee*, 10th March 1826, and subsequent cases.

Horne & Rose, W.S., Petitioner's Agents.

(J. M. M.)

No. 204.

COLLINS AND FEELY, PETITIONERS.

Process—Appeal to House of Lords—Execution pending Appeal—Petition to apply Judgment—Expenses.—Held, 1. That an appellant who had obtained judgment of reversal in House of Lords was entitled to the expenses of opposing an application for interim execution. 2. That he was also entitled to the expenses of the application to apply the judgment of reversal.

2d Division. Collins, Young, and Feely, had engaged in a copartnery, which was dissolved by Young's death. Young's executor presented petition to the Court for the appointment of a judicial factor to wind up the company affairs, which was opposed by Collins and Feely. The Court, however, granted the prayer, and appointed a factor on 17th Feb. 1852; (see vol. i., p. 476.) Collins and Feely appealed. After their petition of appeal had been presented, Young applied for interim execution, which, after opposition, was granted; (see vol. i., pp. 639 and 732.) The House of Lords having on 14th March 1853, ante, p. 54,) reversed the judgment below,

June 1. 1853.

Collins and
Feely, Pet.

Collins and Feely now petitioned the Court to apply the judgment of reversal, “to recall the interlocutor appealed from, and also the subsequent interim appointment of Mr Mackenzie as judicial factor; to refuse the petition of the said Andrew Young for appointment of a judicial factor, with expenses, including the expenses of opposing the application for interim execution and

appointment of Mr Mackenzie as judicial factor, *ad interim*, . . . and to June 1. 1858, find the petitioners entitled to the expenses of the present application."

Millar opposed the petition, in so far as it prayed for the expenses of opposing the application for interim execution. These were not given by the House of Lords. (LORD JUSTICE-CLERK.—They are asked not in respect of, but in consequence of the judgment of reversal.) They ought not to be granted, seeing interim execution was a reasonable and proper step in the circumstances.

Collins and
Feely, Pet.

Dean of Faculty supported the petition. These expenses follow from the judgment of reversal, which declares that the original petition "ought to have been refused with expenses," and remits back to this Court to do "as shall be just and consistent with this declaration and judgment." See *Davidson*, 25th June 1824; *Clyne's Trustees v. Sclater*, 30th June 1835.

The LORD JUSTICE-CLERK. I do not see how we can refuse these expenses. They follow from the judgment of the House of Lords, holding that the original petition for the judicial factor was incompetent. *Sclater's* case is in point.

Dean of Faculty then claimed the expenses of this application. See *Union Canal Company v. Carmichael*, 20th July 1842, *Jurist*; *Brodie v. Sinclair*, 3d Dec. 1831.

The LORD JUSTICE-CLERK. We must grant expenses. You could not have got the expenses in the case without this application.

The COURT . . . "apply the judgment of the House of Lords; Recall the interlocutor appealed from, and also the subsequent interim appointment of Mr Mackenzie as judicial factor; refuse the petition of Andrew Young for appointment of a judicial factor, with expenses, including the expenses of opposing the application for interim execution and appointment of Mr Mackenzie as judicial factor, *ad interim*, and decern; . . . Find the petitioners entitled to the expenses of the application, and remit," &c.

C. & E. Baxter, W.S., Petitioners' Agents.

(J. M. M.)

This day GEORGE DEAS, Esq., took his place on the bench by the title of June 1. 1858.
LORD DEAS.

LORD ROBERTSON took his place in the First Division in room of LORD CUNINGHAME resigned.

EDMUND v. BROWN OR GRANT.

No. 205.

Act 1621, c. 18.—*Bankruptcy—Fraud—Conjunct and Confident—Reduction—Relevancy.*—Circumstances in which the averments in an action of reduction at common law, and also on the statute 1621, of certain transactions alleged to have been entered into by a bankrupt to defraud his creditors *Held* relevant to support the conclusions of the action.

Question, whether, in such action, the pursuer is bound to allege that he was a creditor of the bankrupt prior to the date of the transactions under challenge.

This was an action of reduction, &c., raised both at common law, and on 1st Division. the Act 1621, c. 18, at the instance of Edmund, as trustee on the sequestrated June 2. 1853. estate of Nicol. It was directed against Mrs Grant, the aunt of the bankrupt's wife, who was her next of kin, for the purpose of setting aside certain transferences in the defender's favour. The grounds of action proceeded on the allegation that the bankrupt was the defender's "law agent, confidential

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adviser, and intimate friend." And they were farther thus specified generally, at the dates of all, and each of the transactions before specified, between the bankrupt James Nicol, and the defender, of the conveyances and transferences made and obtained by him in her favour, and of the deeds and missives before narrated, the said James Nicol was insolvent, and they were all and each made and obtained by him in favour of the defender, without any true, just, and necessary cause, without any just price or other consideration being given by her therefor, and after he had contracted lawful debts to the creditors. The pretended considerations for them were not paid or advanced by the defender, or out of her funds, and are inadequate. And all and each of the said transactions, transferences, deeds, and missives, were entered into and executed for the purpose of defrauding the bankrupt James Nicol's lawful creditors, and are to their prejudice."

In defence, it was pleaded that the allegations were irrelevant, or not sufficiently specific to support the conclusions of the summons.

The Lord Ordinary (Curriehill), repelled the defences, and "before answer, appoints the pursuer within eight days to lodge a draft of the issue or issues he proposes for trying the question in dispute." His Lordship added the following note :—

"The defender maintains that the pursuer's allegations are essentially defective, because he does not expressly set forth that the debts, or some of them, now owing by the bankrupt, were contracted prior to the date of the transactions under challenge. But as the pursuer expressly alleges that the conveyances under challenge were granted after the bankrupt was in a state of insolvency, and without an onerous or just cause, and were fraudulent and collusive devices to defeat the just rights of the bankrupt's creditors, the Lord Ordinary does not think that it is necessary for the pursuer to allege that all or any of the existing debts were contracted prior to the date of such deeds, *in so far as the challenge proceeds on the common law.*

In so far as the challenge proceeds on the statute 1621, the want of such an allegation certainly places the defender in a worse position than he would have been in if the summons had contained such a statement; and the pursuer will probably not get an issue in support of his challenge under the statute, unless it be framed in stringent terms. But neither the statute itself, nor the decisions following upon it, appear to make such an allegation an indispensable requisite when the challenger dispenses with the benefit of certain presumptions created by the statute, and undertakes the *onus* of proving the bankrupt's actual insolvency when he granted the deeds under challenge to conjunct or confident persons.

The other objection insisted upon by the defender relates exclusively to the challenge on the statute, viz., that while she is not alleged to be a *conjunct* person, the facts alleged do not amount to a relevant statement of confidentiality in the sense of the Act. And it is true that the circumstance of her being the client of the bankrupt, would not, *per se*, infer this. But that circumstance is only one of the several elements which are set forth in the record as inferring confidentiality; and if an issue should be allowed to the pursuer under the statute, it must, as the Lord Ordinary thinks, be so framed as to impose on him the burden of proving confidentiality.

The Lord Ordinary therefore thinks that the pursuer's averments entitle him to an issue at common law, but that it will depend upon the terms of the issue which he asks under the statute 1621, whether or not he can get it under the record in this case. In these circumstances, it is considered advisable, with the view of saving double discussions, that, *ante omnia*, the pursuer should lodge the draft of the issues which he proposes; and the question as to the relevancy or sufficiency of his averments to support the issues, and as to their terms, if they shall be allowed, may be disposed of at the same time."

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The defender reclaimed.

Macpherson, and *Macfarlane*, for the reclamer, referred to *Stair*, b. 1, tit. ix., § 15; *Ersk.*, b. iv., tit. i., § 29; 2 *Bell's Com.*, 183; *Buccleuch v. Sinclair*, Dec. 1728, M. 12,578.

W. G. Dickson, and *T. Mackenzie*, for the respondent, admitted that the parties were not conjunct, but maintained that confidentiality was a matter for the jury; enough has been set forth here to entitle the pursuer to an issue of confidentiality. It is not necessary for a pursuer to aver that he represents prior creditors; 2 *Bell's Com.* 184, and, at all events, the pursuer as trustee for all the creditors, represents the prior creditors.

The LORD PRESIDENT suggested that the pursuer's statement might be amplified to the extent of adding the averment that the pursuer did in fact represent such prior creditors; and the rest of the Court concurring, and an addition to that effect having been made at the bar, his Lordship then said:—

I do not think that sufficient grounds have been cited to us for altering the interlocutor. Looking to the whole record there is sufficient relevant matter averred to allow investigation. We are dealing with a matter of relevancy. It is set forth in sufficiently explicit terms that these various interests were given to this person by the bankrupt when he was insolvent, when he was on the eve of bankruptcy, without consideration, and with the view of defrauding his creditors. When it is alleged that all this was done to a person in the relation to the bankrupt in which the defender stands, no more is, I think, required at common law. The first objection on the statute being now obviated by the correction, the only other one stated is the defect in setting forth what amounts to the relation of confidentiality. Now I think there is enough set forth here in that respect as mere matter of averment. The whole circumstances when explained may make it more or less clear, but as a matter of averment I think there is sufficient.

The rest of their Lordships concurred.

The COURT "adhere, . . . and allow the pursuer to give in amended issues, reserving all questions of expenses."

H. G. Dickson, W.S., Pursuer's Agent.

Gordon, Stuart, & Cheyne, W.S., Defender's Agents. (J. S. M.)

M'FARLANE, ADVOCATOR.

No. 206.

Sasine—Writ—Date.—An instrument of sasine did not specify the year of the Christian era, but merely bore as its date "the 18th day of April in the year of our Sovereign Lord

George, by the grace of God . . . the forty-sixth year:"—*Held* that it was null, because it did not say which of the different kings of the name of *George* was meant, and so had not even one certain date; and that it was therefore unnecessary to decide the *Question*, whether it is essential to the validity of such an instrument that its date be described by the year both of the Christian era and of the Sovereign's reign.

2d Division.

June 2. 1853.

M'Farlane,
Advocator.

M'Farlane presented to the Sheriff of Chancery a petition for special service as heir to his father in the lands of Ballincleroch. The instrument of sasine in favour of his father set forth the invocation in these terms:—"In the name of God, Amen. Be it known to all men by this present public instrument, that upon the eighth day of April in the year of our sovereign Lord George, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, the forty-sixth year; in presence of me, Notary Public," &c. But the year of the Christian era was omitted, and so the instrument contained only one date. The Sheriff dismissed the petition, on the ground that in accordance with the decisions in *Hoggan v. Ranken*, 13th July 1835, House of Lords, 30th July 1840; and *Brechin Town Council v. Arbuthnot*, 11th December 1840, the instrument of sasine was null, as not bearing, in addition to the year of the King's reign, the year of the Christian era; that the precept of sasine in the disposition was still open, and that therefore he could not serve petitioner to his ancestor as having died last vest and seised in the lands.

M'Farlane having advocated, the Lord Ordinary, (Curriehill) reported the case to the Second Division, and observed in a note, "until the statute 8th and 9th Vict. c. 35 came into operation, it was necessary that an instrument of sasine should set forth its date, because its date regulated the period within which it could be inserted in the Register of Sasines. Until that time, the universal practice had been to point out the year by reference both to the Christian era and to the reign of the existing Sovereign. And in the two cases of *Hoggan* and *Brechin*—opinions were stated, that it was necessary to point out the year in both of these ways. And hence the advocator's demand, to have an instrument of sasine sustained, with only one of the dates, is somewhat startling, and requires serious consideration. On the other hand, in neither of the cases above mentioned was it necessary to decide that question; and it was not decided; and it does not appear to have been authoritatively decided. And as, in the present case, the true date of the instrument of sasine clearly appears *ex facie* of the instrument itself, it cannot be held to be null and void as not stating its date, unless it be held that, by the law of Scotland, a reference to the Christian era as well as to the reign of the Sovereign is required as a solemnity for ascertaining its date. No such solemnity appears to have been established by statute. The origin and history of the practice of stating more than one date in notarial instruments are fully stated by Craig, ii., 7, 12, and also in Ross' Lectures on Conveyancing, ii., 180. It is correctly stated in the advocator's minute, that, according to that usage, the practice in Scotland prior to the Reformation was to point out the year by referring to the indiction as well as to the Christian era and the King's reign. But after the Reformation the Court held itself warranted to sustain an instrument in which the indiction was not correctly referred to, in the case *Bruce v. Livingstone* mentioned by Craig, and the practice of referring to the indiction was thereafter discontinued; and this appears to shew

that, at that period at least, it was not held to be an indispensable solemnity June 2. 1853. that *all* the different modes by which in practice the year had been described should be observed. Nor is it easy to discover a satisfactory reason why the use of *both* of the two remaining modes of describing the year should be held to be an indispensable solemnity in a case where, by one of them, the date is unequivocally ascertained. A reference to either of them has always been held sufficient to point out the dates of other documents of the greatest importance. The dates of Acts of Parliament, Signet letters, &c., have been held to be sufficiently pointed out by reference to the year of the Sovereign's reign. But still, if the Court shall hold that practice has rendered the use of *both* references a legal solemnity for the purpose of pointing out the date of such instruments, the failure in the use of it would be fatal to the instrument in question."

M. Farlane,
Advocator.

Young, for the advocator, argued in a minute, that *one certain and unmis- takeable* date was all that was necessary in an instrument of sasine; that the custom of inserting two dates was not founded on statute, or the observance of it held essential by any of our institutional writers, or by any decision. Conveyancers might anxiously repeat the same thing in different forms, but the law did not require that any thing, however important, should be stated more than once. The judgments in *Hoggan* and *Brechin* proceeded on the ground that, where the two dates are disconform, it becomes uncertain which is the true one.

The whole Judges were consulted, and unanimously returned the following opinion:—"The instrument of sasine does not specify the Sovereign in whose reign the sasine is said to have been expedite, inasmuch as it merely sets forth that his Majesty's name was *George*, without distinguishing which of our different kings of that name was meant. In consequence of this defect, the reference to the year of the Sovereign's reign does not serve the purpose of ascertaining the date of the instrument. Such being the case, this instrument has truly not even one certain date, and consequently, is null and void; and it is not necessary here to decide the question which is raised by the note of the Sheriff in Chancery, whether it is essential to the validity of such an instrument that its date be described by reference to the year, both of the Christian era and of the Sovereign's reign."

On advising this opinion, the COURT, in respect thereof, "refuse the note of advocacy, and remit to the Sheriff of Chancery *simpliciter*."

J. & J. Wright, W.S., Agents.

(J. M. M.)

DEESIDE RAILWAY COMPANY v. ANDERSON AND RHIND; No. 207.
AND ANDERSON v. DEESIDE RAILWAY COMPANY.

Lands Clauses Consolidation Act, §§ 26, 27, 30, and 35—*Railway—Arbitration—Oversman—Submission—Statute, construction of*.—A proprietor of lands intersected by a proposed railway, intimated that he desired his claims of compensation to be settled by arbitration in terms of the statute. Arbiters were named by both parties, and an oversman by the arbiters. The arbiters having differed, executed devolution in favour of the oversman, who, however, declined to act. Three months having elapsed since the nomination of the arbiters, the proprietor, maintaining that there had never been a valid statutory submission, on account of the oversman's declinature, intimated *de novo* to the company that he had

named a new arbiter. The company having declined to name one on their part, he nominated his to be sole arbiter, in terms of the statute :—*Held* that he was not entitled to have a new submission entered into, and that the three months having elapsed without any award in the former submission, the proprietor's claims fell now to be settled by a jury in terms of sec. 85 of the Act.

2d Division.

June 3. 1853.

Deeside Rail.
Co. v. Ander-
son and Rhind.

On 9th September 1852 the Deeside Railway Company gave the ordinary statutory notice to Anderson, as proprietor of certain lands, that they required them for the purpose of their undertaking. In answer, Anderson on 29th September inclosed his claim in respect of his lands, and intimated his exercise of the statutory option to have his compensation settled by arbitration, if the company should dispute the amount he demanded. A submission was accordingly entered into in terms of the Lands Clauses Consolidation Act, and Horne was nominated arbiter on behalf of the company on 8th Jan. 1853, and Matthews on behalf of Anderson on the 10th of same month. On the 14th the arbiters accepted, and in their minute of acceptance appointed Smith to be oversman in terms of sec. 26* of the above statute. On 28th January, they prorogated the term for pronouncing their award till 14th February, but having differed in opinion, they pronounced no award, but merely executed a devolution in favour of Smith, within the prorogated time.† On 15th February, Smith was informed for the first time of his appointment as oversman; but he declined to act. Thereupon Anderson, on 21st March, of new intimated to the railway company his wish to have his claim settled by arbitration, and transmitted to them a nomination of Rhind to act as his arbiter. He also requested the company to appoint an arbiter on their part. The company having refused to do so, Anderson on 8th April, appointed Rhind to act as arbiter for both parties, under sec. 24 of the statute. This was suspension and interdict presented by the railway company, on 9th April, to have Anderson prohibited from taking any steps in virtue of Rhind's nomination, and to have Rhind prohibited from acting as arbiter. Interim interdict was granted, and the cause reported to the Court by the Lord Ordinary.

G. Young, and Neaves, for suspenders. No award having been pronounced in an arbitration, validly entered into in terms of the statute, within three months from the last nomination of an arbiter, the compensation must now be

* "Where more than one arbiter shall have been appointed, such arbiters shall, before they enter upon the matters referred to them, nominate and appoint by writing under their hands, an oversman to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special Act: And if such oversman shall die, or become incapable to act, they shall forthwith after such death or incapacity appoint another oversman in his place; and the decision of every such oversman on the matters in which the arbiters shall differ shall be final. Sec. 27—If in either of the cases aforesaid, the said arbiters shall refuse, or shall for seven days after request of either party to such arbitration, neglect to appoint an oversman, it shall be lawful for the Lord Ordinary on the application of either party to such arbitration, to appoint an oversman," &c.

† Sec. 30 enacts, "If, where more than one arbiter shall have been appointed, and neither of them shall refuse or neglect to act as aforesaid, such arbiters shall fail to make their award within twenty-one days after the day on which the last of such arbiters shall have been appointed, or within such extended time as shall have been appointed for that purpose by both such arbiters under this Act, the matters referred to them shall be determined by the umpire to be appointed as aforesaid."

settled by a jury under sec. 35 * of Lands Clauses Act; and the railway com- June 3. 1853.
pany cannot be compelled to enter into a second submission.

Cook, and Dean of Faculty, for respondents. There is no case here for the ^{Deeside Rail.}
operation of sec. 35, for no legal or competent submission was ever entered ^{Co v. Ander-}
into. To make an effectual submission under the statute, there must be a ^{son and Rhind.}
complete appointment of an oversman, as well as of arbiters, *see* sec. 26. But
here the oversman never accepted. At common law there is no *complete* sub-
mission, unless the referee accepts, for submission is a tripartite contract.
Therefore the complete statutory tribunal, consisting of arbiters and oversman,
never was created; and respondent is still entitled to demand that his claim
shall be disposed of by arbitration.

The LORD JUSTICE-CLERK. I reserve my opinion as to the question,
whether, if the arbiters address themselves to the duty of nominating an
oversman, and do nominate one regularly and fairly, not being aware of any
objection on his part to act, and he does not accept, their power to nominate
another oversman exists or not under this Act. I reserve my opinion also as
to the construction of sec. 27, whether it entitled the respondent to resort to
the Lord Ordinary; for supposing he could have taken that step, he has not
tried to bring himself under that section. He wishes to begin with a new sub-
mission; and his argument is, that there was here no reference at all to arbi-
tration in terms of the statute, because the statutory tribunal never was
created, the umpire having failed to accept. I cannot take this view. I think
that there was here a regular statutory submission; that the failure contem-
plated by sec. 35 has occurred; and that the other machinery provided by
the statute must now be resorted to.

LORDS COCKBURN, MURRAY, and WOOD concurred.

The COURT accordingly "pass the note, and grant interdict as craved."

The COURT had before them at the same time a suspension and interdict at
Anderson's instance, to have the railway company prohibited from taking any
steps to obtain a settlement of the compensation by jury, under a notice given
by the company of their intention to take that course under sec. 37 of the
Act. In this case "the Court refuse the note; Find the suspender liable in
expenses," &c.

Lockhart, Morton, Whitehead and Greig, W.S., Agents for the Railway Company.
Inglis and Leslie, W.S., Agents for Anderson. (J. M. M.)

BALLINGALL, PETITIONER.

No. 208.

Pupils Protection Act, 12 and 13 Vict., c. 51—*Interest, penal*.—The Court has no power
to remit or modify the penal interest prescribed by the statute, however favourable the
circumstances.

It is enacted by section 5 of the Pupils Protection Act, "That the factor shall 2d Division.
lodge the money in his hands in some one of the banks in Scotland established June 3. 1853.
by Act of Parliament or Royal Charter, in a separate account or on deposit.

* "If the party claiming compensation shall not, as herein before provided, signify his
desire to have the question of such compensation settled by arbitration; or if, when the
matter shall have been referred to arbitration the arbiters or their umpire shall for three
months have failed to make their or his award, the question of such compensation shall be
settled by the verdict of a jury, as herein after provided." ^{Petition,}
Ballingall.

June 3. 1853. And if the factor shall keep in his hands more than £50 of money belonging to the estate for more than ten days, he shall be charged with a sum to the estate at the rate of £20 *per centum per annum*, as the excess of the said sum of £50, for such time as it shall be in his hands beyond the said ten days; and unless the money has been so kept from innocent causes, the factor shall be dismissed from his office, and shall have no claim for commission." Section 22 provides for the charging of this penal interest in the case of factories subsisting at the date of the Act.

Petition,
Ballingall.

It was held in this case that these sections are imperative, and leave the Court no discretion to remit or modify the penal interest in any case, however favourable the circumstances may be.

The report of the Accountant of Court bore, that, in the circumstances, he "would willingly have departed from penal interest, but, according to his view, the 5th and 22d sections are imperative, and leave him no discretionary power whatever." Compareance had also been made for the next of kin of the lunatic, who expressed their approval of the whole management of the factor, and desired that penal interest should be passed from.

J. & J. Macandrew, S.S.C., Agents.

(J. M. M.)

No. 209.

CONNAL AND LEISHMAN, PETITIONERS.

Process—Grounds and Warrants—Register—Extract—Clerical error.—In a summons, in which decree had been extracted, two clerical errors occurred, which were repeated in the record and in the extract decree. The Court, on summary petition, authorised the extractor to re-transmit the proceedings to the clerk to the process; and thereafter allowed the necessary corrections to be made on the summons; and, *de novo*, pronounced decree in the action.

2d Division. Connal obtained decree of proving the tenor of a disposition of certain subjects. In the description of these subjects in the summons, two clerical errors occurred, which appeared also in the record and in the extract of the decree, June 4. 1853. "Kirk Road" being inserted instead of "High Road," and "pertinents" instead of "portions." This petition prayed the Court "to authorise the petitioner, Mr Leishman, to correct and authenticate with his signature these errors when they occur in the summons, which was signed by him; and also to grant warrant to the principal Extractor of Court to make the corresponding alterations on the extract of the decree; . . . and that the corresponding corrections may be made on the record."

Pet., Connal
and Leishman.

Scott supported the petition by the case of *Rowe v. Duncan*, 1st March 1849, Jurist.

LORD JUSTICE-CLERK. I do not like altering the record of a process after extract. I think the proper course is to make an application similar to that in *Cadell's* case, (14th January 1853).

The petitioner, accordingly, now prayed the Court "to grant warrant to the principal Extractor of Court to re-transmit the summons and whole proceedings to the clerk to the process, and to open up the decree, or take whatever other step may be necessary for allowing the alteration in the summons above specified, and thereafter to allow the same, and pronounce decree in terms of the amended summons, or to do otherwise," &c.

The Court, on 1st June 1853, "grant warrant to the principal Extractor

to re-transmit the summons and whole proceedings in this case to the clerk June 4. 1858. to the process;" and of this date, the following interlocutor was pronounced :
 "The Court having renewed consideration of the petition of William Connal, ^{Pet., Connal} jun., and John Leishman, and productions now made, authorise and allow ^{and Leishman.} the alterations specified in the petition to be made on the summons : and the same being so made, they *de novo* find the *casus amissionis* of the disposition . . . and the tenor thereof as libelled under the amended summons proved,—and decern and declare accordingly."

John Walls, S.S.C., Agent.

(J. M. M.)

ALLAN v. KERR'S TRUSTEES, &c.

No. 210.

Joint Stock Company—Purchase of shares—Fraudulent misrepresentations—Insolvency—Reduction—Relevancy.—A reduction was brought by the purchaser of shares in a joint stock company of this transaction, on the ground that he had been induced to enter into it in consequence of the fraudulent representations by the directors of the prosperity of the company, while the company was in point of fact at the date of the transaction insolvent, and, according to the terms of the contract of copartnership, dissolved :—*Held*, that there being no allegations that the defenders, who sold the shares, were parties to such misrepresentations, the averments were not relevant to set aside the transaction, and to liberate the pursuer from liability as a shareholder, and therefore that the action could not be sustained.

This was a reduction at the instance of Allan of a purchase made by him 1st Division. of 100 shares of the stock of the Glasgow Commercial Exchange Company, June 7. 1858. from the trustees of the late Alexander Kerr, on the ground that the pursuer "was induced to become a partner and shareholder of the company, in consequence of the false and fraudulent statements, representations, and actings, or the fraudulent or undue and wrongful concealment of the said Glasgow Commercial Exchange Company, and its directors and others, representing and acting, and entitled to represent and act for the said company;" and the summons contained declaratory conclusions to the effect that the pursuer stands relieved of all liabilities as a partner, at all events in all questions with the defenders or any of them, and farther concluded for £5000 of damages.

^{Allan v. Kerr's Trustees, &c.}

This company was established in 1845. By the contract of copartnership its business is declared to consist of lending money on stocks of railway and other joint stock companies, and on real and personal property of every description, &c. The provisions of the contract, so far as applicable to this case, are as follows:—

The holders of the stock, are, by the 7th section, declared liable for the losses, and bound to relieve each other, in proportion to their respective shares. The management of the company is vested in directors, on whom large powers are bestowed. By the 14th section, a committee of directors is declared necessary to be appointed, who are to examine and report upon the affairs of the company once in every three months. By the 17th section, the directors are to subscribe a declaration pledging themselves to secrecy. By the 27th section, a reserved surplus fund is to be established. By the 29th, a stock ledger is appointed to be kept, in which the names of all the partners, whether original or assumed, are to be entered; and the persons so entered are to be proportionally liable in the losses.

A general annual meeting is to be held on the first Thursday of August

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annually; and by the 35th section it is provided, that 'at every annual general meeting the ordinary directors for the time being shall exhibit a statement or abstract of the preceding yearly balance-sheet, and such farther statement or report of the affairs of the company as they may deem it expedient or proper for the interests of the company to be made public, and shall then declare the annual dividend of profits; and every such statement or abstract and report shall be binding and conclusive on all the partners and their foresaids, unless some error shall be discovered therein before the next subsequent statement or abstract shall have been produced; and in that case such error shall be rectified, and this always without prejudice to the provisions herein after contained, as to the appointment and powers of auditors.'

By the 40th section the shares are declared transferable; and it is provided, that a partner who has disposed of his shares in terms of the regulations, 'shall be entitled to relief of and from the whole debts owing by the company, and of all obligations granted for the same, and, in general, of every prestation incumbent on the company; and the other partners, including the party or parties who shall have acquired such shares or shares, shall be bound, as they hereby bind and oblige themselves, and theirs aforesaid, respectively, to relieve him, his heirs and successors, of the same; but he or they shall not be entitled to claim any other relief than that contained in this obligation: And the party or parties acquiring such share or shares shall, in regard to the whole debts and obligations contracted by the company, whether prior or posterior to the period of such party or parties becoming partner or partners, take and assume the precise place and liability of his or their author, ancestor, or cedent, and become subject to all the obligations incumbent upon him.'

The 42d and 46th sections contain further provisions regulating these transfers. By the 48th, which provides for the keeping of correct books, it is declared, that these books 'shall be balanced as upon the thirtieth day of June 1846, and as upon the thirtieth day of June in each succeeding year. A statement or abstract of the company's affairs, as upon the date of each yearly balance, shall be made out, and regularly examined, docketed, and subscribed by at least two of the ordinary directors, and shall be laid before the partners at the annual general meeting, to be held on the first Thursday of August thereafter, for the satisfaction of all concerned: And it is hereby provided and declared, that the partners, other than the said ordinary directors, shall not, on any account or pretence, have right to see or examine the books, accounts, and documents of the company, but shall be bound to rest satisfied with the yearly statements or abstracts above provided for.' There is a power, however, for a majority of the partners to appoint auditors, who are to investigate into the state of affairs, and who are also to be pledged to secrecy.

The 50th section provides, that 'it shall be competent to and in the power of any of the partners of the company, holding not less than three-fourth parts of the capital stock of the company, exclusive of stock held by the directors for the company's behoof, at any general meeting to be held in terms of this contract, by a written agreement subscribed by them, or their mandatories, duly authorised in writing, to dissolve the said company, as upon a date to be specified in such written agreement; and upon such written agreement being

duly subscribed by partners holding stock to the said extent, personally, or by mandatories authorised as aforesaid, the said company shall be dissolved, as upon the date to be mentioned in the said agreement, and the affairs of the company shall be wound up and brought to a close: But it is hereby expressly provided and declared, that if it shall at any time be found on balancing the company's books, that losses have been sustained equal to the whole of the reserved surplus fund, and also to one-fourth part of the advanced capital stock of the company, exclusive of stock held by the directors for the company's behoof, such loss shall, *ipso facto*, and without the necessity of any farther procedure, dissolve and put an end to the company; and in either of the said events, the said dissolution shall be forthwith notified by the said ordinary directors, by advertisement and circular letters, in like manner as is provided with regard to special general meetings of the company, as well as in the London and Edinburgh Gazettes, which advertisements in the gazettes and newspapers shall be continued once a week, for at least one calendar month succeeding the dissolution; and within thirty days at farthest after such dissolution, the company shall discontinue all operations and ordinary business not necessary for winding up the company's affairs: And it is hereby provided and declared, that the said company shall continue, notwithstanding the death, bankruptcy, incapacity, or retirement of any of the partners, and shall not be dissolved otherwise than in manner above written.' "

The pursuer alleged that at an annual meeting held in May 1849, a report was submitted, shewing a profit sufficient to pay a dividend of 6 per cent, free of income tax, besides a sum of nearly L.10,000 to be carried to the reserved surplus fund; that the substance of the report was published in the newspapers of the day; and in consequence of the favourable view which it contained of the company's affairs, the market value of the stock was kept up, and that the pursuer, relying upon the accuracy of the report, and deceived by its statements, was induced in January 1850, to make the purchase now sought to be reduced; that a transfer of the shares was completed, and the pursuer's name entered in the stock-book of the company as proprietor of 100 shares, on which L.5 per share had been paid; that a call of L.5 per share having been made in March, led to an investigation into the affairs of the company, and that it then appeared that a sum had been lost greatly more than the sum required by the contract to dissolve the company; that a notice dated 30th April, notifying that the company was dissolved in terms of sec. 50 of the contract, was sent to each shareholder, and that arrangements were thereupon made for winding up its affairs, and that it has been found necessary in order to meet the debts of the company, to make a demand for a contribution or call of L.20 per share; that the pursuer is ready to prove that at the date of the annual meeting in August 1849, or at all events at the date of the pretended sale and transfer, the company had sustained losses equal to the whole of the reserved surplus fund, and also to one-fourth part of the advanced capital stock of the company, exclusive of stock held by the directors for the company's behoof, and that the company was therefore dissolved in terms of the contract; that at the date of the alleged transfer, there was no such thing as stock in the Glasgow Commercial Exchange Company, and the defenders, Kerr's trustees, instead of selling 100 shares of the stock of the

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June 7. 1833. said company, were disposing of an obligation equal to at least L.2500, and which sum the pursuer has since been called upon to pay in consequence of the alleged transfer of shares, and fraudulent recording thereof in the books of the said company; that the false and fraudulent misrepresentations by the directors of the company in their report of 1849, and the fraudulent suppression or undue concealment of the true state of the company's affairs, were had recourse to for the purpose of enhancing the price of the company's shares; that the defenders took benefit by the said representations and concealment in afterwards disposing of their shares. He therefore pleaded that no transfer of shares could have been legally effected by any of the shareholders, so as to make over the liabilities of partnership from the seller to the purchaser.

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Trustees, &c.

Defences were lodged for Kerr's trustees, who pleaded that the pursuer's averments were not relevant to set aside the transaction by which he became a partner, or sufficient to liberate him from the liabilities thereby undertaken. As the sale and transfer were carried through by the defenders in perfect good faith, and without fraud or misrepresentation of any sort, the transaction could not be challenged, in so far at least as they were concerned, and they could not be affected by the alleged fraudulent acts of the directors of the company, with which they had no concern, and for which they cannot be made responsible.

Defences were also lodged for the company, pleading generally that the pursuer's allegations were not relevant or sufficient to support the conclusions of the action against them.

The Lord Ordinary (Robertson)—“In respect no grounds relevant or sufficient in point of law have been set forth to warrant the conclusions of the present action or any of them: Repels the reasons of reduction, sustains the defences, assoilzies the defenders, and decerns: Finds the pursuer liable in expenses,” &c.

In a note his Lordship stated:—“There are two events in which the dissolution of the company is here provided for. The first of these is an agreement subscribed by three-fourths of the partners. This of course must mean an agreement, not only executed, but immediately acted on. It never could be an agreement which was to remain latent, because the dissolution as thereby arranged is immediately to be publicly notified, and the operations of the company are to come to an end, within thirty days at farthest after such dissolution. But the second mode of dissolution is to be followed up in the same manner, and that is to take place ‘if it shall at any time be found, on balancing the company's books, that losses have been sustained equal to the whole of the reserved surplus fund, and also to one-fourth part of the advanced capital stock of the company. The plain meaning of this is,—apart from the contemplation of any fraud,—that if this deficit shall be found, on the annual balancing of the company's books as laid before the meeting, then the dissolution shall be *ipso facto* held to have taken place, and immediate advertisement shall be ordered.


The Lord Ordinary by no means intends to express an opinion, that where there has been a fraudulent concoction of balance sheets, and the deficit has been unduly concealed, there shall be no remedy to the shareholders as

against the directors, and that the concern must go on, notwithstanding the actual deficit, until the directors are pleased to report the truth. On the contrary, he held in the case of *Collins v. the North British Bank*, 18th December 1850, Dunlop, 18, p. 849,—where a partner offered to prove that the deficit had occurred, and sought to have the concern brought to a close,—that there was nothing in the contract to exclude him from this remedy, although the balance-sheet fraudulently concealed the deficit. But if the partners are deceived at the time, and no step is taken to stop the actual carrying on of the business, it by no means seems to follow that at any time, the business having gone on for years, a partner who accidentally discovers that a deficit has occurred, either by mistake or fraud, is entitled to have the concern declared dissolved as at a particular date, and although he may have stood as a partner on the books for years, drawn dividends, and paid calls, he is entitled, on an assumed *ipso facto* dissolution, to get quit of his own responsibilities, and throw them on a partner who had retired.

Neither Kerr's trustees nor their authors are charged with any fraud or concealment. They were not directors of the concern, nor in any way connected with the balance-sheets. The annual reports of the directors disclosed nothing from which the alleged deficit could be discovered. If there was fraud or deception in the annual reports of 1847, 1848, and 1849, it was a fraud and deception not practised by them, but on them. However inaccurate these reports may have been, they did not hold out a very flattering representation of the concern. But in no view is it said that the defenders had any personal connection with the reports. To whatever the pursuer trusted, he could hardly think the company was very flourishing, for he knew that L.5 had been paid upon each share, and yet he purchased them at the rate of L.2 : 7 : 6, being less than one half of the sum actually paid up. It is admitted that the sale, which took place in November 1849, was carried through in the public market. The stock was thus traded on as an existing commodity, and the company held out to the public as an existing company; and it was in point of fact carrying on business, whether liable to be dissolved or not, in consequence of an actual deficit not yet discovered. The transfer was accomplished through the mutual brokers of the parties, so that there could have been no personal deception or misrepresentation. The concern was a going concern. There had been no ascertainment of the deficit necessary to dissolution. Kerr's trustees, the sellers, had as little suspicion of this as the buyer, or as the brokers engaged by either party.

The pursuer says, that he bought for the purpose of investment. He ought, on this account, to have looked the more carefully into the terms of the contract of the company, of which he became a shareholder. By the transfer, which is a mutual deed, the trustees made over their stock to the pursuer, and, on the other hand, the deed bears, "I, the said James Allan, do hereby take and accept the said capital stock, and hereby become partner of said company, and bind and oblige myself, as such, to implement, perform, and fulfil the whole obligations, conditions, rules, and regulations contained in the contract of copartnership of the said company, dated the 2d day of June 1845 years, and subsequent dates, and assign, convey, and make over the foresaid one hundred shares, and profits thereon, to the company, and the ordinary

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directors thereof for the time being, in real and preferable security, for the purposes, to the effects, and with the powers specified in article forty-ninth of said contract; and the whole of the articles of the said contract are held as repeated *brevitatis causa*, more particularly to the effect of authorising summary diligence thereon." It is admitted that this deed was delivered to the company, and the pursuer's name entered in the "Stock Ledger." Under the contract, the liabilities connected with these shares immediately attached to him. The balance-sheet of August 1849 was binding and conclusive against him, to the same extent as it was against the other partners, and he was bound in the relief stipulated by the 40th clause. Nor by the substitution of the pursuer's name for that of Kerr's trustees did the company obtain any advantage. They, as well as he, have been all along, and still are, solvent: and whether his purchase of the stock at the market price of the day turns out a good or a bad speculation is immaterial to the company. In this respect, the case of the *Forth Marine Insurance Company v. Burnes*, 15th February 1848, Dunlop x, 649, affirmed 16th July 1849, Scottish Jurist, v. 21, p. 540, was far more favourable to the party seeking to be relieved of the stock, because the company there got the advantage of a solvent instead of an insolvent partner. But after having acquired his shares, and being registered in the books as the owner of them, the pursuer received a dividend on these shares in February 1850. A call of £5 per share was made in March 1850, and in April 1850, new directors having been appointed, it was reported on the 22d of May 1850, that the deficit contemplated by the 50th clause of the contract had occurred, the concern was declared dissolved, and measures directed to be taken for winding it up. The pursuer acknowledges that thereafter, in June 1850, he paid £100 to account of the call made in March. It was not until the 15th of March 1851, that the pursuer brought the present proceedings.

On the construction of the 50th section as applicable to the present case, and on the assumption that it now can be ascertained, that on the second of August 1849 the contemplated deficit had actually occurred, the Lord Ordinary can see nothing apart from the allegations of fraud, which can entitle the pursuer to have the defenders reinstated in his place as at that date.

But it is said there was fraud on the part of the directors, and that the company cannot take advantage of such fraud. Here there is no advantage to the company. But even if it should have been more desirable for them to have continued Kerr's trustees on the stock-ledger than the pursuer, they were not entitled to do so, the transfer having been legally made. There was no fraud by Kerr's trustees; and although the directors had kept this concern afloat by flourishing representations, how could this invalidate the transaction betwixt parties equally innocent? There is no allegation of conspiracy between the directors and Kerr's trustees. On the contrary, the trustees were the dupes of these directors, and as Lord Brougham observes in the case of *Burnes*—"It is not enough for a man to say—If you had not given such an appearance of the flourishing state of affairs—if you had not by paying dividends out of capital, and by making the public believe that you were paying them out of profits, given this flourishing appearance to the concern by your own acts and deeds, I should never have bought my shares. That I say is not enough. You must shew that there has been some specific fraudu-

lent conduct which gave rise to the particular contract in question. It is not June 7. 1858. a general averment of *dole*. It must be *dolus dans locum contractui*. That is the language of the civil law, which all nations have followed, and the general principle of which in all matters of personal contract, is the law of all Europe at this moment. On these grounds the Lord Ordinary is of opinion that no relevant cause of action has been stated against Kerr's trustees." Allan v. Kerr's Trustees, &c.

The pursuer reclaimed, for whom—

Mure, and *Neaves*, argued, that the company was at the date of the sale in point of fact dissolved, and that therefore the pursuer had never actually been a partner of it, and they referred to *Collins*, 18th Dec. 1850, *Steinbach*, 9 *Simmon's Reports*, 556, Feb. 1839; *Drew v. Dick*, 31st May 1850.

T. Mackenzie, *Hector*, and the *Dean of Faculty* for the respondents, were not called on.

The Court were unanimously of opinion, that the interlocutor of the Lord Ordinary was right. The grounds of their opinions were in accordance with the views stated in the Lord Ordinary's note.

The Court therefore "adhere" with additional expenses.

Tait and Crichton, W.S., Pursuer's Agents.

W., A. G., & R. Ellis, W.S., Agents for Kerr's Trustees.

Alexander Hamilton, W.S., Agent for Glasgow Commercial Exchange Company.
(J. S. M.)

MORRIS and POLLOK v. TENNANT.

No. 211.

Trust-Settlement—Liferent—Fee—Faculty—Death-bed.—A truster conferred on each of his two daughters a power, "by any *mortis causa* deed," to convey a portion of their share of the residue of his estate liferented by them, a large portion of which was heritage; and farther, in a certain event, "full power and faculty to settle, destine, and convey the fee of the share of the residue liferented by them respectively."—*Held*, That such residue did not vest in the daughters in fee, and that a trust-settlement executed on death-bed by one of the daughters, disposing of her interest under her father's trust, was not executed in per-judice of any right of succession to the residuary estate competent to her heirs, whether at law or of provision, but in exercise of a power and faculty lawfully conferred upon the grantor by the terms of her father's trust-disposition and settlement.

This was a reduction of a trust-settlement, dated 19th December 1849, 1st Division. executed by Mrs Janet Pollok or Tennant, and was insisted in by the pur- June 7. 1858. suers as her heirs of provision under a trust-settlement by James Pollok, her father, dated 13th February 1839. The truster had two daughters, Mrs Sym Morris and Pollok v. Tennant. who predeceased him without issue, and Mrs Tennant. The nature of his settlement was as follows:—By the 4th and 5th purposes, the trustees are directed to hold the free residue of the estate, heritable and moveable, as regards one half thereof for behoof of his daughter, Mrs Sym, "in liferent, for her liferent alimentary use alienably, but with power and faculty to her as after-mentioned, and for behoof of the child or children" of her body, in such proportions, and subject to such conditions, as she might declare by deed, or failing such deed, equally among them and the heirs of their bodies respectively in fee: and, as regards the other half, for behoof of his daughter Mrs Tennant and her issue, in liferent and fee respectively, in terms precisely

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similar. A power was conferred upon the daughters respectively in the event of either dying without issue, "by any *mortis causa* deed, to dispoise, destine, and convey a portion of the share of the residue of my estate liferented by her, not exceeding £3000, to such person or persons, and in such way as she may think fit;" and in regard to the remainder of each daughter's share, or the whole of it, should the power not be exercised, the trustees are directed to hold the same in trust for behoof of the surviving daughter in liferent for her life—rent use alienably, and for behoof of her children and their heirs in fee.

Under the 6th purpose of the deed, the present question more immediately arises. It is there provided in the event—which happened—of neither of the truster's two daughters leaving issue, "then, and in these events, full power and faculty is hereby committed to my said daughters respectively, to settle, destine, and convey the fee of the share of the residue of my estate liferented by them respectively, to such person or persons, and in such way and manner as they think fit, but under burden always of the survivor's liferent: and failing my said daughters, or either of them, exercising such power and faculty, then the fee of said share or shares shall go and belong, in equal proportions," to the truster's brothers, William and Morris, (the pursuers,) and his sister Susan, and their respective heirs.

Under these several provisions, and by the death of her sister, Mrs Tennant came to be entitled to the liferent of the whole residue: and—as her sister did not execute any deed relative to her share—with the power and faculty "to settle, destine, and convey" this estate. The pursuers alleged that to a large extent there became thereby vested in Mrs Tennant heritable estate to which they were her heirs of provision, and they now sought to reduce her trust-settlement, giving to her husband all the estate to which the power or faculty of disposal under her father's settlement might apply, on the ground that that deed had been executed to their prejudice on death-bed.

In defence, death-bed was denied; but assuming the deed to have been granted *in lecto*, two pleas were maintained: 1st, That no right of fee was conferred on Mrs Tennant by her father's trust settlement, but merely a power and faculty relative to his succession, which might be validly exercised on death-bed: and, 2d, That supposing Mrs Tennant to be fidei, her right under the settlement must be viewed as moveable and not heritable in any question affecting her succession.

The Lord Ordinary (Cowan) finds, "that according to the sound construction of the trust-disposition and deed of settlement of James Pollok, father of the deceased Mrs Janet Pollok or Tennant, dated 13th February 1839, the residue of his trust-estate did not vest in his said daughter in fee; finds that the trust-disposition and settlement by her, of date 19th December 1849, under reduction, was not executed in prejudice of any right of succession to said residuary estate competent to her heirs, whether at law or of provision, and that the same, in so far as it applies to said estate, was granted in exercise of a power and faculty lawfully conferred upon the granter by the terms of her father's said trust-disposition and settlement; finds that the pursuers have no right or title to challenge the validity of the trust-disposition and settlement executed by the said Mrs Janet Pollok or Tennant in exercise of the said power and faculty on the head of death-bed; therefore sustains the

defences stated to the action on these grounds, and assolzie the defender, June 7. 1858. and decerns; finds him entitled to expenses."

In a note his Lordship stated, that, had the latter of the defender's pleas ^{Morris and Pollok v. Tennant.} appeared to him free of dispute, "it would have been unnecessary to have disposed of the more delicate and somewhat difficult question involved in the first plea. But as the trust-deed of Mr Pollok contains merely a *power* to sell the heritable estate, or such part thereof as to the trustees might seem proper, and the special purposes of the trust did not require, for their fulfilment, that this power should be exercised—the Lord Ordinary has been unable to arrive at the conclusion, that the residue of Mr Pollok's estate must be dealt with as moveable. That a large proportion of the property left by Mr Pollok, and not required for the fulfilment of the special purposes of his trust-deed, was heritage is not disputed in the record, and was admitted at the bar. And it is farther an admitted fact, that, at the death of Mrs Tennant, on 9th February 1850, that proportion of the estate continued heritable, while additional portions of the estate had been converted by the trustees from moveable into heritable investments. As regards such portion of the residue as was *de facto* heritable prior to these recent investments, the Lord Ordinary, on the authority of the case of *Cathcart*, and of the other cases founded on by the pursuers, and for the reason he has indicated, would have been prepared to sustain this action on the assumption of Mrs Tennant, under her father's settlement, being *fiar*. According to the sound construction of that deed, however, it appears to him that Mrs Tennant is to be viewed, not as *fiar*, but merely as possessed of a power and faculty of settling the estate, so as to regulate the ultimate disposal thereof by the trustees of her father at the termination of her *liferent*.

That a power or faculty may be exercised on death-bed—although the parties taking under the deed by which the power is conferred may be injuriously affected by its exercise—is not made subject of dispute. The law of death-bed protects the heir against any deeds which his ancestor may grant to his prejudice *in lecto*. The rule does not include deeds other than such as prejudice rights of succession that would have fallen, but for the death-bed deed, to the granter's own heir, whether of law or of provision; and this cannot be predicated of deeds granted in exercise of a power or faculty conferred on a third party. The heir of the faculty-holder is not injured in his right of succession by the granting of such deeds. It is the right, not of the granter's heirs, but of those taking under the deed which conferred the faculty or power, that is affected. Hence it is that the argument of the pursuers is directed to shew that the legal character of Mrs Tennant's position under her father's deed was that of *fiar*, so as to place them *in titulo* as her heirs to insist in this action.

Had the power to convey, contained in the 6th purpose of the deed, been expressed in similar terms with the power contained in the 4th and 5th purposes—that is, that it should be exercised 'by any *mortis causa* deed'—it seems very clear that no right of fee could have been held to be conferred. For, as regards the L.3000 which each of the daughters was thereby permitted to settle by a *mortis causa* deed, in the event of her dying without issue—the terms of the settlement exclude the notion that anything beyond a mere

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faculty or power to affect the father's succession to that extent was intended. The right of the daughter is limited to a bare liferent, but with a power or faculty which might or might not be exercised. If not exercised, the whole estate liferented is declared to be held by the trustees for behoof of the surviving sister and her issue; and it cannot be thought, that, failing the exercise of the power, this daughter and her issue, in taking the predecessor's whole share, could be entitled thereto on any other footing than as conveyed to them *nominatim*, and as part of the granter's estate destined to them directly by his trust-deed.

The pursuers dwelt much at the debate upon the words 'by any *mortis causa* deed' not occurring in that provision of the settlement which specially requires to be dealt with in this discussion. But, *first*, it appears to the Lord Ordinary, that, looking to the words actually employed—'settle, destine, and convey'—and to the general structure of the deed in its 4th, 5th, and 6th purposes—the enlarged power and faculty conferred by the 6th purpose on each of the daughters, in the event of neither having issue, cannot be regarded as at all different in its legal character and effect from the more limited power and faculty conferred by the 4th and 5th purposes, in the event of there being issue of the other daughter to take the predecessor's share. And even were the legal effect of the provision under consideration to be judged of by its own terms, without reference to the other parts of the deed, there would still, in his opinion, be no room for holding Mrs Tennant *fiar*. Had no deed been executed in exercise of the power, the ulterior destination in the deed must have taken effect. The brothers and sister of Mr Pollok were in that event declared to be the parties for whom the estate was to be held by the trustees; and it is nothing to the purpose to say, that the succession was carried to them as conditional institutes. Admitting this, the conditional institution was dependent, not on the failure of the granter's daughters without issue, but on their failure to name persons to take the estate under the exercise of the power. Even if the clause calling the brothers and sister to the succession were deemed substitutional, the same result would follow. The substitution must be viewed as intended to have effect on the failure, not of the daughter and her issue, on whom the power was conferred, but of the persons named in the exercise of the power to take the residue as the estate of the granter. Such seems to the Lord Ordinary to be the sound and consistent reading of the deed.

Various decisions were referred to by the pursuers to establish that, under a disposition taken by a father to himself in liferent, and to his son in fee, but with reserved power to the father to burden, sell, or dispose of the subjects at pleasure, the father is truly *fiar*. This principle was not disputed by the defender. It is plainly inapplicable to such a case as the present. When, along with the liferent, all the powers of a proprietor over the subjects are conferred, there is nothing wanting, either in substance or in form, towards the constitution of a fee in the dispositive's person. It is quite different where the bare liferent is accompanied merely with power and faculty to settle and destine the subjects to such persons, and in such manner, as the liferenter may think fit. The power must, in such a case, be exercised, otherwise the destination in the deed will remain operative, and, when exercised, the power is

effectual as a destination of the fee specially to the persons named, and to no other party, June 7. 1853.

It may be only farther observed—as bearing on the intention of the granter, Morris and Pollok v. Tennant. that no fee in the residue of his estate was to vest in his daughters, or any of them—that the trust-deed contains, after the enumeration of all its purposes, an anxious declaration that the provisions conceived in favour of his daughters were to be taken exclusive of the *jus mariti*, and not to be assignable by the daughters, or liable for their debts or deeds, and to be purely alimentary to them. If the granter meant his daughters, in the case which happened, to become absolutely vested with the fee of his estate, such an unqualified declaration would scarcely have been found in his settlement.”

The pursuers reclaimed.

Young, and Neaves, for the reclaimers; (1.) Liferenters with power of disposal are in effect fiars; *Baillie v. Clark*, 23d Feb. 1809, F. C.; *Dickson v. Dickson*, 7th Dec. 1780, F. C.; *Anderson v. Young and Trotter*, 24th Dec. 1784, F. C., and Dict. voce Faculty, vol. 8, 204; *Davison v. Davison*, Fount., Nov. 1687, vol. 1, p. 478, Stair, B. iii., t. 5, § 51; *Earl of Dumfermline v. Earl of Callendar*, 27th June 1676, Stair's Decisions, 2, 480, Dict. voce Fiar, vol. 1, p. 300, Ersk. B. iii., t. 8, § 36; *Fead v. Maxwell*, 4th Feb. 1709, Forbes' Decisions, *Rome, competition with creditors of Graham*, Feb. 1719, Kaimes' Decisions, vol. 1, p. 31, No. 16, Dict., vol. 1, p. 298, voce Faculty; *Sinclair v. Sinclair*, Dict. 1, p. 298, voce Faculty; *Creditors of Rusco v. Blair*, Dict. 1, p. 292, voce Faculty; *Creditors of Earnshaw v. Douglas*, Dict. 1, p. 298, voce Faculty; *Abercromby v. Graham*, Dict. 1, p. 292 voce Faculty; *Hyslop v. Maxwell*, 11th Feb. 1834, 8 S. 413; (2.) Heirs-substitutes are entitled to pursue a reduction *ex capite lecti*; *Manner v. Davison*, Feb. 1682, Harcarse, No. 649, voce Lectus Egritudinis, p. 179; (3.) Subjects *sua natura* heritable have an heritable interest in such settlements as that of Mr Pollok, under its sixth purpose; *Cathcart's Claimants*, 26th May 1830, 8 S. and D. p. 803; *Davie v. Coutts*, 30th Nov. 1791, F. C.; *Burrell and Others*, 4 S. and D. 314. *In re Evans*, 2 Crompton, Meeson, and Welsby, 206.

Muir, for the respondent. Death-bed is not relevant to reduce a disposition by a liferenter, though having the strongest powers to dispose, unless he be formally fiar; *Weddell*, 8d Feb. 1849; *Somervell v. Geddis*, 23d Nov. 1743; *Elchies*, voce Death-bed, No. 16, Dict. voce Death-bed, p. 8300.

THE LORD PRESIDENT. The view I take is very short. As a general proposition, a deed executed in the exercise of a faculty conferred is not struck at by the law of death-bed. The question at present is, whether the deed under challenge is made in the exercise of a faculty conferred on one not fiar of the subjects, or on one who is in law fiar of the subjects. It appears to me that on a true reading of the 4th and 5th clauses, the position in which Mrs Tennant was placed, was that not of a proper fiar, but of liferentrix with a faculty of conveying in a certain event. The point arises whether, when there is a more enlarged power as given in the 6th purpose, it is there also to be regarded as a faculty, or whether the position of Mrs Tennant is converted from that of liferentrix into something of the nature of a fiar. Now I think it is not so. If it was desired to give this power in the form of a faculty, I do not know any other way in which it could have been expressed. Does it follow

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from the conferring this power that it converts the true position of liferentrix under the deed into that of fiar? I do not see how it should necessarily have that effect: and unless it necessarily had that effect, then this is as clearly expressed a faculty as I can imagine.

LORD IVORY. I am of the same opinion. Three points contain the substance of all that can be said in the matter. (1.) There is no fee in this lady. (2.) What she has is a faculty by direct constitution, and not by reservation; and, (3.) The pursuers of the deed are the parties who have adopted the very deed containing the faculty they are disputing. See E. b. 3, tit. 3, § 98,—the doctrine there laid down is also adopted by Professor More in his note.

LOORDS FULLERTON and ROBERTSON concurred.

The COURT "adhere" with additional expenses.

Robert Ainslie, W.S., Pursuers' Agent.

Wotherspoon & Mack, S.S.C., Defender's Agents. (J. S. M.)

No. 212.

M'DOUALL v. GUTHRIE, &c.

Reparation—Slander, written—Relevancy—Issue—Innuendo.—1. Circumstances in which the Court refused to dismiss an action of damages for written slander, on ground that the words used were plainly not actionable—and *Held*, that as the pursuer undertook to prove that the words had been understood in a meaning injurious to his character, he was entitled to have his case sent to a jury. 2. Form of issue approved of for trying the case.

2d Division.

June 7. 1858.

M'Donnall v.
Guthrie, &c.

This was an action of damages at the instance of M'Douall against the proprietor, the editor, and the printer of the "Galloway Advertiser and Wigtonshire Free Press." The pursuer set forth that the following article had appeared in that newspaper under the title of "Burgh Politics:"—"It is somewhat unfortunate for Mr Caird that he happened to be in Stranraer at this time, as the constituency must thereby be forced to the conclusion that he has been giving countenance to a new kind of low tactics, which are not admissible into the higher sphere into which our ambitious townsman seeks to force himself. We refer to the attempt now making to set law and the rights of property at defiance; or rather, to take a pettifogging advantage of the law's delay, in order to retain certain voters in possession of premises from which they ought to have removed at last Whitsunday term—some of whom, having taken their houses for a term of years, had entreated their landlords to relieve them from the occupancy at the last term. Some too, it is actually said, are thus resisting law and order, who are paid to be the law's protectors. We understand, also, that a poor widow was inveigled by a plausible partisan or agent of Mr Caird, to allow one of the removing voters to remain for two months in the house which she had taken—in order thereby to preserve his vote—on the express promise and understanding that she should hold possession of the premises previously occupied by her. Alas, however, for the shortsightedness of mortals, it soon after spunked out, that if the poor widow should remain where she then was, another of Mr Caird's pledged men would be disqualified. Her previous occupation of part of the premises on which the voter referred to is enrolled, has already operated as a disqualification; and no means now used can give him an effective vote, although, by her removal, he might attempt to imprint his name on the Sheriff's poll book for

what it is worth, which is *nil*. The obvious necessity of her removal having somehow dawned on the awakened senses of some of Mr Caird's supporters, a plan was contrived which it was believed would overcome all difficulties. In brief space, the widow's premises were forced open without warning being given to her; and in defiance of all law and justice, her furniture and clothing were bundled out, packed into a garret, and she has been deprived of all access thereto, although the garret in which they are stowed away is part of her own premises. Her lodger, who was to have gone with her to her new house, was turned to the street, and she herself not turned out simply because she was in bed unwell, partly from the effects of her maltreatment. We understand that a complaint has been made to the Sheriff, with concurrence of the procurator-fiscal, in reference to these proceedings. Another more amusing case of the same kind. A voter for Mr Caird having been duly warned, removed on the term day, but through the kindness of his landlord was allowed a day or two to effect a complete clearance of his house, and an old boat with some useless sticks remained on the premises. It soon appeared that he had also been advised to try the law's delays in the hope of holding the kind of possession which he had, till after the election. When the proprietor found that he could not get the key, and that the house was deserted, he put an additional lock on the door for the better security of his property—but this was very soon torn off, it is asserted, by one of Mr Caird's committee, who at all events was present when the lock was removed. Another attempt was made by the proprietor to assume possession of his property, by sending a smith to open the door and put all to rights—the house being deserted by all but some hens which had been allowed to keep sole possession of the premises. The leaders of Mr Caird's party immediately took alarm—being afraid no doubt that the hens would be disturbed—and collected a mob, among whom was the junior magistrate, to oppose the entrance of the smith, who was obliged to sound a retreat, not in fear or alarm, but almost bursting with laughter, for the worthy smith declares that the cackle of the hens within and of the geese without, united to the noise and tumult, rendered the scene ludicrous in the extreme. The domain of the hens was successfully defended, and a petition has been sent to the Sheriff to obtain for the landlord lawful possession of his property, and in the meantime the recusant tenant has been served with an interdict against entering the premises."

The pursuer averred that the part of this article bearing reference to the junior magistrate of the burgh, and the passages connected therewith, were of and concerning him, and falsely and calumniously represented him as attempting to set law and the rights of property at defiance, and, although a magistrate of the burgh, as forming part of a mob collected for an illegal purpose; and that he had thereby been injured both in his private and public character, and in his estate.

The defenders pleaded that the article was not libellous or actionable.

The case was reported by the Lord Ordinary.

Macfarlane, and *Penney*, for the pursuer, supported the relevancy of the action.

Neaves, and *Dean of Faculty*, for defenders. The passage is quite innocu-

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ous : but it is said the people in the burgh understood it unfavourably of the pursuer ; they may have *misunderstood* it, and the defenders cannot be responsible for that. The Court is entitled to take into consideration the words of an alleged libel, and where they have a plain meaning, not actionable, to dismiss the action, and not send it to a jury to determine what meaning certain parties might have put on the words.

The LORD JUSTICE-CLERK. The defenders will not be made responsible for a meaning which the words cannot bear ; but if the defenders injure through the use of ambiguous expressions, they must answer for it. Whether the unfavourable impression is a fair result of the words used, is a question for a jury.

The COURT sustained the relevancy, and the following issue was approved of :—

“ Whether the latter portion of the said article or statement, commencing with the words, ‘ another more amusing case of the same kind,’ to the end, or any part thereof, is of and concerning the pursuer, and falsely and calumniously represents him as attempting to set law and the rights of property at defiance ; and, although a magistrate of the burgh, as forming part of a mob collected for the purpose of violating the law, and illegally opposing and obstructing the protection of property, and the exercise of the rights of proprietorship ; or falsely and calumniously states against him charges to the like effect, to the loss, injury, and damage of the pursuer.”

John M'Cracken, S.S.C.
Dundas & Wilson, W.S.

(J. M. M.)

No. 213.

PETITION, THOMAS KIRKPATRICK.

Curator bonis—Deaf and Dumb person—Incapacity—Evidence—Discharge—Circumstances in which an application for the appointment of a curator bonis to a woman, on the ground that she was deaf and dumb and incapable of granting a discharge to the defenders, was refused.

1st Division.

June 8. 1853.

Petition,
Kirkpatrick.

This was a petition for the appointment of a *curator bonis* to Elizabeth Kirkpatrick, the petitioner's daughter, under the following circumstances :—An action had been raised by Elizabeth Kirkpatrick in the Sheriff Court of Dumfries against certain parties as trustees and executors of a deceased Mr Gibson, and concluding for payment of a legacy to which she alleged she was entitled. Defences were lodged by the trustees, in which they pleaded that the pursuer was deaf and dumb, and incapable of granting a discharge. Along with the defences, there was lodged a certificate by two medical men—which is embodied in the opinion of the Lord President below—the purport of which was, that though her speech was deficient, she was sufficiently intelligent to be able to manage her own affairs. The Sheriff-Substitute, on 29th March, “ Before answer, ordains the pursuer to appear personally before the Sheriff-Substitute for the purpose of undergoing a judicial examination relative to the allegation that she is deaf and dumb, and that she cannot make herself sufficiently intelligible to notaries so as to instruct them to subscribe a discharge, and assigns the 2d day of April” for that purpose. Accordingly, she underwent examination before the Sheriff-Substitute, and thereafter he pronounced an inter-

locutor sisting farther procedure, "in order that an application may in the June 8. 1853. meantime be made to the Supreme Court for the appointment of curators to the pursuers, she being, in the opinion of the Sheriff-Substitute, incapable of discharging or authorising others to discharge the debt sued for, or of otherwise taking charge of her own affairs." In a note he stated, that there were apparent to him no symptoms whatever in the woman "of even the lowest degree of intelligence. . . . From her countenance little can be gathered. Its expression is neither that of utter vacancy or fatuity, nor of mental capacity and intelligence." The judicial examination of the pursuer is embodied in the opinion of the Lord President below.

Petition,
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Fraser appeared in support of the petition.

The LORD PRESIDENT. It is very important that persons who are labouring under physical defects that disable them from managing their own affairs should have the protection of the Court; but, on the other hand, it is equally important that the Court should not give effect to every objection founded upon the physical defects of parties, and not take upon themselves to supersede them in the management of their affairs without being satisfied of the necessity for their interference. The want of the power of speech does not disable a party from taking the management of his affairs, especially when not combined with the want of the power of hearing; and even when it is so accompanied, there are many instances in which persons so afflicted are not merely perfectly capable of managing their own affairs, but exhibit proof of the highest intellect. The intellect may be reached by education. Here, no doubt, there was no education. The want of hearing and speech combined is no proof of want of intellect. The intellect is there, and though access to it through the ear is not open, it may be reached through the eye. The organs may be defective, but the expression of sentiment may be effected by other means than speech; and because the Sheriff-Substitute, who may not have been accustomed to communicate with such persons, was unable to make himself understood, or to understand this person, to make that a ground for the Court interfering, would be going very far indeed. I think that from their experience of such cases, medical men are better qualified to judge than the Sheriff-Substitute can be. They say "that her hearing is natural and distinct, that her speech is deficient, but that the deficiency is dependent upon the imperfect state of her organs of articulation." &c. Against this opinion, we have the report of the examination by the Sheriff-Substitute—no doubt a gentleman of great experience,—but I do not know what may have been his experience in communicating with persons such as this woman. He calls before him this woman, who cannot speak, to emit a declaration, and because she does not emit an intelligible declaration, he holds that she has no intelligence, and cannot manage her property. When interrogated what is her name, we are told that "she made answer by an inarticulate mumbling, wholly unintelligible to the Sheriff-Substitute." But "on asking if she could write, she answered yes, and added some other words which sounded something like, only my name." Thus she has some power of articulation. The doctors say it is deficient only in respect of the imperfect state of her organs of articulation; and they farther say, "that she displays acquaintance with the comparative

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value of money and property : that she is capable of judiciously expending the one and taking care of the other, and that she manifests such a degree of shrewdness and intelligence as would enable her to take charge of her own property." Well, then, being interrogated "If she can write?" She made answer by "Yes," adding some other words which sounded something like "only my name." Being interrogated if she knew Mr Gibson of Gilchristland, and if he had left her money in his will? She answered, "Aye," followed by words that seemed to be "My Uncle." Being shewn a one-pound note, and asked what it was? She immediately counted twenty upon her fingers. Well, that is satisfactory so far—she makes herself understood, and shews no want of intelligence here. Other questions were put, to some of which she returned intelligible answers; but I should have liked to have known what proportion the answers the Sheriff did understand bore to those he did not. And then the examination concludes. "Whereupon the Sheriff-Substitute asked the pursuer to sign the present declaration, but without reading the same over, he being satisfied that she was wholly incapable of understanding it, which request she appeared to understand; immediately taking off her gloves, and taking from her pocket a small slip of paper on which her name was already written, from which she copied slowly her name as underwritten." The Sheriff does not read the declaration over to her because he was satisfied she wanted intelligence to understand it, but he makes her sign his declaration that he is of opinion that she does not understand it. That is no negative however of the medical certificate. The trustees are decidedly entitled to a discharge. There are parties who can communicate with the pursuer by signs, and she may authorise notaries to sign for her, or trustees may be appointed. There is not a sufficient case for the Court interfering to supersede her in the management of her property by the appointment of a *curator bonis*.

LORD IVORY. The Sheriff's procedure is very extraordinary, following as it does on the interlocutor of March 29th. Now, the pursuer is neither deaf nor dumb, and therefore if the defender had proposed to stop the process on the allegation that she was deaf and dumb, that is completely negatived. The Sheriff-Substitute has stopped the process on the ground of want of intelligence, and until an application should be made to the Court. He should have put an end to the record which has been made up only on her instruction, or have appointed a curator *ad litem*, instead of sustaining the process at her instance, and then turning her out as if she knew nothing at all about it. He now proposes to have a *curator bonis* appointed to her so as to render her incapable of acting for herself now and for ever. If there was evidence on the other side to outweigh the certificate produced, that would be another matter. A much simpler way would be for the father who presents this petition to concur with her as cautioner and to get up this money.

LORD ROBERTSON. I am of the same opinion. Suppose this opinion of the Sheriff-Substitute had been the opinion of another medical man, that would only have been the opinion of one medical man against two. But look to the conclusion of the Sheriff-Substitute's opinion. I must say it is very extraordinary. It refers to her personal appearance. For a Sheriff-Substitute to adjudicate upon personal appearance, whether a party is able to

manage her own affairs, is about the most extraordinary thing I ever heard of. June 8. 1853.

The COURT "Refuse the prayer of the petition and decern."

John Gellatley, S.S.C., Agent.

(J. S. M.)

Petition,
Kirkpatrick.

**PITCAIRN, THOMSON, AND OTHERS, competing,
IN MULTIPLEPOINDING,**

No. 214.

REID AND OTHERS, (MORISON'S TRUSTEES) v. BETHUNE.

Settlement—Construction—Legacy—Residue.—Where a testatrix directed her trustees to divide the residue "between and among" her special legatees:—*Held*, that the division fell to be made in equal shares *per capita*, and not in proportion to the amount of the several legacies.

Settlement—Construction—Provision—Annuity—Legacy—Residue.—Terms of provision of an annuity in a trust settlement in virtue of which the annuitant was *held* not to be within the class of special legatees, among whom the residue was directed to be divided.

By general trust settlement, dated 10th January 1844, the late Mrs ^{2d Division.} Morison conveyed to trustees her whole heritable and moveable estates, specially ^{June 8. 1853.} excepting her barony of Naughton, but including the rents of Naughton for the first two crops after her death, over and above those already due at that period. The trustees were appointed, after satisfying certain legacies and provisions, to ^{Pitcairn v. Thomson, &c., in M. P. Reid, &c. v. Bethune.} divide the free residue "between and among John Pitcairn, Walker Pitcairn, James Morison Pitcairn, William Pitcairn, and Andrew Pitcairn junior, equally between them, share and share alike." These residuary legatees, who were sons of Pitcairn of Pitcullo, had also, in a previous part of the deed, special legacies of different amounts bequeathed to them. By codicil dated 13th Feb. 1847, Mrs Morison appointed her trustees to pay to John Pitcairn L.500, to Walker Pitcairn L.700, and to J. M., William, and Andrew Pitcairn L.1000 each, in addition to the legacies bequeathed to them by the former deed. The codicil then proceeded, "with regard to the residue and remainder of my foresaid trust-estate, which by my foresaid deed of settlement is provided to the sons of Andrew Pitcairn of Pitcullo, in respect I have now made additional provisions to them by this codicil, I do hereby revoke and recall that provision and destination of the residue, and I appoint my said trustees to pay and divide such residue, if there any be, after payment of all the legacies and provisions already bequeathed, or that may yet be bequeathed by me, between and among the whole legatees whose legacies exceed L.100 sterling, named and appointed by the foresaid trust-disposition and deed of settlement, or this codicil, or as may be made and appointed by me hereafter: But in the event of the funds left by me being found insufficient for paying all the foresaid legacies, already left or to be left by me, in full, each of them which exceeds L.100 sterling shall suffer a proportional abatement: Declaring that such of the foresaid legacies as do not exceed L.100 shall not be entitled to any share of the residue, but, on the other hand, shall be paid in full, although there should be a deficiency for answering all the legacies." The legacies of sums above L.100, bequeathed by the testatrix, exceeded forty in number.

This was a multiplepoinding raised by her trustees; and the first question

June 8. 1853. that arose for discussion in it, was, whether the residue fell to be distributed among the legatees of sums exceeding L.100, by an equal division *per capita*, or in proportion to the amount of their respective legacies.

Pitcairn v. Thomson, &c., in M. P., Reid, &c. v. Bethune. J. M. Pitcairn contended for the latter principle of division. John Thomson contended for the former; and his view was sustained by the Lord Ordinary (Rutherford), by interlocutor quoted below on p. 448.

His Lordship observed in a note, "The Lord Ordinary sees no ground upon which to hold that it was her intention to divide the residue of her estate among the parties to whom she destines it, in proportion to the amount of their special legacies. She constitutes her residuary legatees the whole legatees whose legacies exceed L.100 sterling, and her trustees are directed to pay and divide such residue between and among them. The ordinary meaning of these words is clear; she refers to the legacies that exceed L.100 as designating those legatees who were to take the residue; and the reason was plain enough,—that the legacies below that amount were either given as mere expressions of regard, or to persons such as domestic servants, who had been sufficiently provided for by their special legacies. If the words stood alone, . . . the direction to pay between and among must have implied a direction to pay equally between and among. But the legatees who require that the residue shall be divided in proportion to the legacies, found upon the clause regulating abatement in the event of deficiency. . . . The Lord Ordinary does not think it possible . . . to import into a clause for distribution of excess, a principle which the testatrix specially applies to abatement. She might very well have made a different rule in the two cases, wishing, in the event of deficiency, to give her principal legatees as nearly as possible their relative proportion; and feeling that an equal abatement would bear very hard upon those to whom the smaller sums were bequeathed. But in the distribution of excess, she might very well have felt that her principal legatees getting all the sum that was specially meant for them, the residue should be equally divided, though the effect of the equal division might be to make the smaller legatees relatively better off. But the more material observation is, that the testatrix was very well aware of the language she was using; and, accordingly, provides in express terms for proportional abatement, though she says nothing of proportional division. The Lord Ordinary does observe that in the trust-deed in which the residue was primarily disposed of, she directs her trustees to divide the free residue among her legatees there called, 'equally between them, share and share alike.' But he does not consider that the absence of these words in the subsequent directions to divide the residue is sufficient to overcome the implied rule of equal division or to introduce a proportional division, more especially with reference to the terms in which the codicil narrates the terms of the trust-deed, the words, 'equally between them, share and share alike,' not being recited. Lastly, the great number of additional legacies given by the codicil may have very much affected, in the testatrix's calculation, the amount of the residue."

J. M. Pitcairn reclaimed, for whom,—

Ross, and Dean of Faculty, argued, that the ordinary rule as to equal division does not apply here, where the parties are stamped by a mark of predilection indicated by the amount of their respective legacies. *A priori* in such

a case the testatrix could not be expected to intend an equal division of residue; and the whole tenor of the deeds is in harmony with this view, especially the clause regulating abatement.

June 8, 1858.
Pitcairn v.
Thomson, &c.,
in M. P., Reid,
&c. v. Bethune.

Monro, and *Neaves*, for Thomson. Where residue is divisible among a class, the rule is, that the division shall be equal; and the intention of the testatrix can only be gathered from the words of the deed interpreted according to certain fixed legal rules.

The LORD JUSTICE-CLERK. We are here construing a deed, prepared in technical language by a man of business; all conjecture, therefore, as to *a priori* intention must be thrown aside. According to every principle of grammatical and legal construction, the words used import a division into equal shares.

The other Judges concurred.

There was another point arose for decision.—

In the general conveyance of 1844, Mrs Morison included the rents of Naughton for the two first crops after her death. In a codicil dated 4th March 1848, she speaks thus:—"Whereas it is my wish that in the event of Adam A. Duncan . . . succeeding me in the said lands of Naughton and others, under and by virtue of the deed of entail of the said lands already executed by me, some provision should be made for him out of my estate before his right to the rents and duties of the said lands of Naughton, would commence as aforesaid. Therefore, I do hereby direct and appoint my said trustees to make payment to the said Adam A. Duncan, in case he shall survive me and succeed to the said lands and others as heir of entail, of a life annuity of L.1000 out of each of the foresaid two years' rent, . . . during the said two years," payable half-yearly "as the rents themselves become due." On 22d December 1849, she executed a special trust-disposition, conveying Naughton to Lord Camperdown and others, as trustees for the purposes contained in relative deed of instructions; on the same day, by another codicil to the general trust-disposition of 1844, she revoked the annuity to A. A. Duncan, and appointed her general trustees "to make payment out of my said general trust-estate to my trustees under my said trust-deed of Naughton, during each of the first three years after my death, and if the said Adam Alexander Duncan be then alive, the sum of £700 sterling . . . the said payments to cease with that made at the term immediately preceding the death of the said Adam A. Duncan in the event of his dying before the expiry of the said three years." The deed of instructions to the special trustees, after referring to this provision of £700 per annum, appoints that they shall out of that annual provision "advance and pay to the said Adam Alexander Duncan, in the event of his surviving me, from time to time during the first three years after my death, such sum or sums as they may deem requisite and proper for his support and maintenance, not exceeding in all the sums which they may receive from my general trustees as aforesaid, but as much less as they may think advisable and proper," any balance not paid him to be paid at his decease to his representatives.

June 8. 1858.

Pitcairn v.
Thomson, &c.,
in M. P. Reid,
&c. v. Bethune.

In this multiplepointing Lord Camperdown and the other special trustees claimed, on behalf of A. A. Duncan as one of the special legatees, that they should be preferred to a share of the residue corresponding to the sums payable to them under the bequest of £700 per annum.

The Lord Ordinary held Mr Duncan to be a special legatee, and so entitled to a share of the residue, though not in proportion to the amount of his legacy.

His interlocutor "Repels the claim for the said Earl of Camperdown and others, trustees foressaid, as in right of the legacy to Adam A. Duncan, his heirs, executors, or representatives; and also the claim for James Morison Pitcairn, in so far as they claim to be preferred to shares of the residue in proportion to the amount of the special legacies: Sustains the claim for the Rev. John Thomson, and also the claim for the said James M. Pitcairn, and the claim for the said Earl of Camperdown and others, as in right of the legacy to Adam A. Duncan, . . . to an equal share of the said residue, as it shall be divisible among the said legatees *per capita*. . . . Finds all the claimants entitled to their expenses out of the fund *in medio*," &c.

J. M. Pitcairn reclaimed, for whom—

Ross argued, that Duncan was not one of the residuary legatees. His right was virtually a taking back from the general, and restoring to the special trustees, part of the rents of the lands, and so was a mere payment out of those rents, and not a special legacy.

G. Young, *contra*. It is a payment not out of the rents, but out of the residue into which these rents fell. It is just a legacy.

The LORD JUSTICE-CLERK. On this last point I am unable to concur with the Lord Ordinary. I cannot think Mrs Morison understood Mr Duncan to be one of her special legatees, or intended that he should ever get more than the £700 *per annum*. Besides this provision to him is posterior to the deed by which she directed the distribution of the residue among the legatees above £100.

The other Judges concurred.

The COURT "Adhere to the interlocutor reclaimed against, except in so far as regards the claim for the Earl of Camperdown and others, . . . as in right of the annuity to Adam Alexander Duncan, and repel the said claim to an equal share of the residue in respect of the said annuity," &c.

Murray & Ferrier, W.S., Agents for Pitcairn.

Dundas & Wilson, W.S., Agents for Thomson.

Gibson-Craig, Dalziel, & Brodie, W.S., Agents for Lord Camperdown, &c.

(J. M. M.)

No. 215.

CROKAT v. LORD PANMURE.

2d Division.

June 8. 1858.

Crokat v.
Panmure.

Process—Multiplepointing—Legitim.—A multiplepointing is an incompetent form of process for constituting a claim of *legitim* made by the real raiser against the executor under his father's will, who was nominal raiser, and the parties to whom his father's moveable estate was bequeathed.

This was an action of multiplepointing brought in name of Crokat, sole executor under the late Lord Panmure's will, by the present lord, the real

raiser. Crokat was also residuary legatee. The competition set forth was ^{June 8. 1853.} between the legatees under the will and the real raiser who claimed legitim; and claims were lodged for the latter, and also for two of the legatees. The nominal raiser objected to the competency of the action, on the ground that there was no proper competition for the executry funds, and that the real raiser ought to have constituted his claim for legitim in an ordinary action. Crokāt v. Panmure.

The Lord Ordinary (Robertson) repelled these pleas, and sustained the competency.

Crokāt reclaimed; for whom—

Baillie, and *Neaves*, argued, that the question here was not between the beneficiaries under the will and a party who had constituted a claim against the executor, or was a creditor under the will. Between a residuary legatee and one who merely alleges a right to *legitim* there is no competition; the former denies that the latter is a creditor, and this denial is not a competition. Further, if the right to *legitim* be found to exist, it is the right of a preferable creditor, who cannot raise a multiplepinding, because there is really no competition between him, and legatees whose claims extend merely to the dead's part.

Dean of Faculty, for Lord Panmure. There is here all that is necessary to sanction a multiplepinding, viz., a fund in the hands of a party, and claims made thereupon, which cannot all be satisfied out of it. A multiplepinding involves mutual reductions. The real raiser is not like an ordinary creditor, but comes forward, on the contrary, to challenge the testamentary title of the legatees, so far as it interferes with his legal title, which the legatees, on the other hand, have an interest to set aside.

LORD JUSTICE-CLERK. The right to *legitim* is one which vests a *morte testatoris*. The party claiming it is a creditor to the effect of entitling him to institute his action for payment, and to the effect of preventing him from being disappointed by deeds of the father diminishing his claim. The duty of the executor is to collect, recover, and distribute the funds of the deceased, out of which the *legitim* is to be paid. On that account, therefore, but on that account only, the demand for *legitim* is directed against the executor. I cannot see in what sense we can say that a competition arises here. If the claim for *legitim* be disputed, the executor is entitled to resist it, to the effect that no portion of the estate be set aside to satisfy it. If he be unsuccessful in this, a portion of the estate is withdrawn from him by force of law. The case resolves into a simple denial by him of the existence of Lord Panmure's claim; but such a denial does not make a competition. Lord Panmure's course was to have raised an ordinary action of constitution against the executor. For a multiplepinding there are no grounds.

LORD COCKBURN. I must say that I am not satisfied that a multiplepinding is incompetent in the circumstances of this case, though it may not be the handiest form of process. All that is necessary to justify a multiplepinding is, that there be a fund in the hands of a holder, and a competition of claims (it need not be of diligence) on that fund. We have this here. There is an undoubted contradictor to the claim of the real raiser in the person of the residuary legatee, and the mere circumstance of there being but two claimants

June 8. 1853. is no good objection. We have here all the leading facts which give rise to multiplepointings in nine out of ten cases in which they occur.

Crokat v.
Panmure.

LORD MURRAY concurred with the Justice-Clerk.

LORD WOOD. This is a multiplepointing brought by a party—and he is the only party—who claims a right, vesting in him *a morte testatoris*, to a portion of the moveable estate of his father, and who to the extent of his claim is substantially a creditor. The right to *legitim* is a debt to this effect, that, like other claims of that nature, it is one between which and the legatees, special and residuary, there can be no competition. It is true that if *legitim* is due the total sum to fall to the legatees will be diminished, and the same thing may be said in regard to any other debt claimed by an alleged creditor. If sustained, then so much will be withdrawn from the amount for distribution among the beneficiaries. If rejected, then the greater will be the sum left for distribution. In so far, therefore, as it is contended that a competition is raised upon the fund between the legatees and the party claiming *legitim*, the same might equally be maintained in the case of any common creditor on the estate. But I apprehend that that would not be sufficient to render it competent to a common creditor—in order to constitute his debt—to raise multiplepointing in the name of the executor, and thereby most unnecessarily bring the *whole* estate into Court, and so render a judicial distribution of it unavoidable. And just as little do I think it competent to a party who may have a claim for *legitim*, extending to a half or only to a third of the estate, to raise a multiplepointing for the purpose of its constitution. The constitution of the claim of *legitim* being the only object which Lord Panmure can be stated to have in view, his proper course (and it is the obvious, simple, and direct one) was to have raised action of constitution against the executor. To have the beneficiaries under the will as parties is wholly unnecessary. As claiming *legitim* he has nothing to do with them. They have no right except as against the fund *remaining* after his right shall have been satisfied; and whether his right exists or not is a question, which, as it cannot be affected by any right *they* possess, can be effectually tried and determined, and ought to be so, in an ordinary action against the executor, the holder of the estate, who represents it, and whose general administration,—which is admittedly taken subject to responsibility for that portion of the estate which falls to the *legitim*, if Lord Panmure is entitled to it, and will then be withdrawn from the rest of the estate,—ought not to be disturbed, as it must be if this multiplepointing were sustained. In this case, that feature is absent which in the *Breadalbane* case, 20th January 1836, gave competency to this form of process; and whatever countenance some of the authorities may seem to afford to the competency in the present instance, I think those of more recent date go in a different direction, and shew the sense of the Court that there had been a tendency to entertain the process of multiplepointing in circumstances in which the resorting to it was in truth an abuse of a very valuable form of action when kept within its proper sphere. Adopting the view which has been recognised and acted upon in these more recent cases, I am of opinion that the present process ought to be dismissed.

The COURT “after the interlocutor of the Lord Ordinary reclaimed against: Find that in the circumstances of the case, the real raiser was not entitled to

raise this process of multiplepounding in the name of the executor, and there-
fore dismiss the present process, and decern: Find the real raiser liable in
expenses," &c.

June 8. 1853.
Crocket v.
Panmure.

Adam & Kirk, W.S., Reclaimers' Agents.

Gibson-Craig, Dalziel, & Brodie, W.S., Agents for Lord Panmure.

(J. M. M.)

CRICHTON v. GREIG.

No. 216.

2 and 3 Vict., c. 41, § 36—*Bankrupt—Sequestration.—Held, (diss. Lord Ivory)* that a requisition by a body of creditors on an individual creditor to assign a security held by him "in terms of law," is a sufficient compliance with § 36 of the Bankrupt Act, in respect it must be held to import an offer of payment of 20 per cent. in addition to the valuation put by the creditor upon such security.

This was an advocacy from a decision of the Sheriff of Forfarshire.

1st Division.

At a meeting of the creditors of Alexander Meldrum for electing a trustee on his sequestrated estate, the respondent Greig was elected trustee. Crichton the complainer had lodged a claim and oath to a debt of L.224 : 0 : 8, and claimed a right to vote upon a balance of L.219 : 0 : 8, being the difference between the debt and L.5, the value he put on certain arrestments and securities. At this meeting, Flowerdew the preses, moved that the meeting accept of the arrestments and securities at the value put thereon by Crichton in his affidavit, and that Crichton "be called on, in terms of law, immediately, and on payment of said valuation, to assign to the trustee all right and claim under the said arrestments and securities." Flowerdew—who represented a majority in value of the creditors—voted for the motion, and no other person voting, it was declared carried, and Crichton was called on to grant the assignation, and take payment of the valuation, and the trustee was instructed accordingly. By § 36 of the Bankrupt statute it is enacted, "that it shall be competent to a majority of the creditors, (excluding the creditors making such oath), assembled at any meeting and during such meeting, to require from the creditor making such oath, a conveyance, or assignation in favour of the trustee to such security or obligation, on payment of the specified value, with 20 per cent. in addition to such value; and the creditor shall be bound to grant such conveyance or assignation at the expense of the estate." The draft of an assignation was prepared and submitted to Crichton and his agent for revisal, bearing that he was to receive payment of the aforesaid valuation in terms of law, together with L.1, being 20 per cent. thereon. Crichton declined to grant the assignation, in respect that at this meeting "no offer was made for payment of the 20 per cent. in addition to such value." Thereupon the trustee, Greig, presented a summary application to the Sheriff to compel Crichton to grant the assignation and receive payment. The Sheriff found for the trustee; and Crichton advocated.

June 9. 1853.

Crichton v.
Greig.

The Lord Ordinary (Wood), found that the motion and call "cannot soundly be construed as importing that the complainer upon granting the assignation was only to receive the specified value of his security, but must be construed as meaning that he would receive, in compliance with the call, all that a creditor in such a case was entitled to by the provisions of the 36th section of the statute: Finds that the complainer was consequently not entitled to refuse to accede to the said call, or to revise the draft assignation

June 9, 1858.

Crichton v.
Greig.

sent with a view to carrying it into effect, and to subscribe the same when adjusted : Therefore of new finds for the trustee with expenses." In a note, his Lordship stated, "There may be some nicety in this case, but upon the whole matter the Lord Ordinary concurs in the result come to by the Sheriff. The proceeding throughout is statutory. The right of the creditors to take the security at the valuation put on it by the creditor holding it, and to insist for an assignation, is a statutory right, which, in terms of the 36th section of the statute, that is, in terms of law, the creditors can only avail themselves of in a certain way, viz., by giving the creditor not only the valuation, but 20 per cent. more. That is the only footing on which, by the statute, the creditor can be required to make over the security ; and the legal inference (if not excluded) is, that when the creditors acting upon their statutory privilege call upon an individual creditor to assign the security he holds, they call on him to do so on payment of the value he has put on it, with the statutory addition . . . It is apprehended that any other construction would be altogether too rigid in dealing with proceedings in reference to such a provision as that of the 36th section of the Act, in respect of its being plainly contrary to what could be meant, as it would have been contrary to what *that* legal right of the creditors is, which they were professedly and indisputably acting upon, and to the terms of which, it must be presumed, they meant to conform."

Crichton reclaimed, for whom—

Pattison. The offer must be made in distinct and precise terms. A mere general phrase, "in terms of law," will not do, as one-half of the creditors may not know what such a phrase really imports.

Macfarlane, for the respondent. There are no precise terms under the statute in which such a requisition should be made.

The LORD PRESIDENT. There is no doubt as to the meaning of the statute. The only question is as to the meaning of the words used in the minute of the meeting. That minute is not clear. But it is not necessary to use the precise words of the statute, and I am therefore for adhering.

LORDS FULLERTON and ROBERTSON concurred.

LORD IVORY. I am inclined to differ. This is a statutory matter, and a statutory rule must be strictly construed. There are two matters embodied in section 36, that which is incumbent on the creditors, and that which is incumbent on the party making the affidavit. The latter must grant an assignation in terms of the statute, but the other party, in order to bring the matter up to that point, must make a requisition in terms of the statute. Now that is conditional on two things ; on payment of the value of the assignation, and on payment of 20 per cent. ; and if both of these things are not complied with, it is not a requisition in terms of law. The terms of this minute seem to me clearly to limit the phrase, "in terms of law," to the granting the assignation, and as the consideration therefor, to take payment of the valuation without any thing else.

The COURT "adhere," with additional expenses.

John Young, S.S.C., Reclaimer's Agent.

John Murray, junr., S.S.C., Respondent's Agent.

(J. S. M.)

BLYTHE AND TAYLOR v. ROBSON.

No. 217.

Suspension and Liberation—Justiciary—Statute 2 and 3 Will. IV., c. 68, § 11.—Held, that the warrant to cite parties charged with contravention of this statute must bear to proceed upon the oath of a credible witness.

The respondent Robson, as procurator-fiscal, presented petition and complaint to the Justices of Peace for Roxburghshire, against Blythe and Robson, charging them with contravention of 2 and 3 Will. IV., c. 68, (Day June 10. 1853. Poaching Act). The following deliverance was pronounced:—"Kelso, 25th Feb. 1853.—Having considered the preceding petition and complaint, grants warrant to constables to serve a copy thereof and of this deliverance upon each of the therein designed, John Taylor, junior, and Charles Blythe, tertius, and cite them to appear personally to answer to the same in a Court to be held by one or more of her Majesty's Justices of the Peace for said shire, within the town hall of Kelso, upon Friday the 1st day of April next, at 12 o'clock noon, with certification, and further grants warrant for citing witnesses to appear same time and place. (Signed) GEO. SCOTT, J.P." The proceedings resulted in a conviction of both parties, and in sentence of a fine, or imprisonment in the event of failure to pay.

They presented bill of suspension and liberation, which was now supported by—

Pattison, on the ground that the above warrant did not bear to proceed on the oath of a credible witness. This is contrary to § 11 of the statute, which enacts, "That the prosecution for every offence punishable by virtue of this Act shall be commenced within three calendar months, and that, where any person shall be charged, on the oath of a credible witness, with any such offence before a Justice of the Peace, the Justice may summon the party charged to appear before himself," &c. See cases of *Smith v. Forbes*, 22d July 1848, Arkley, p. 508; and *Simpson v. Crawford*, 22d Dec. 1851, Jurist.

The following judgment was pronounced:—

The Lord Justice-Clerk, &c., "in respect that in granting the warrant to cite the parties in this case, it does not bear, in conformity with the 11th section of the Act, to be founded on the oath of a credible witness—pass the bill—suspend the sentence complained of *simpliciter*, and decern: Find the respondent liable in expenses," &c.

James Somerville, S.S.C., Suspenders' Agent.

M'Kenzie, Innes, & Logan, W.S., Respondent's Agents. (J. M. M.)

HOOD v. YOUNG.

No. 218.

Statute 9 Geo. IV. c. 29, sect. 19—Summary Conviction—Falsehood, Fraud, and Wilful Imposition.—It is competent for the Sheriff without a jury to convict summarily under this Act for falsehood, fraud, and wilful imposition.

Suspension and Liberation—9 Geo. IV. c. 29, sect. 19—Complaint, prayer of—Sentence—Punishment.—The prayer of a criminal complaint, in a summary proceeding before the Sheriff under this Act, being for imprisonment only:—Held, that the Sheriff could not competently under it pronounce sentence of fine. Question—Whether such prayer was strictly in accordance with the statute, seeing it did not pray alternatively for a fine "or for imprisonment," but only for imprisonment.

High Court of
Justiciary.

June 10. 1853.

Hood v.
Young.

This was a suspension by Hood of conviction and sentence pronounced by the Sheriff-substitute of Dumfries, on a criminal libel at the instance of the respondent, the procurator-fiscal, which charged the suspender and another party with falsehood, fraud, and wilful imposition, and prayed "your Lordships to grant warrant to apprehend the said Michael Keenan or Teenan and William Hood, and to cite them to appear before you to answer to this libel; and thereafter to decern and adjudge them to be imprisoned in the prison of Dumfries, each for a period not exceeding sixty days, to deter others," &c.

The Sheriff-substitute, on 25th March 1853, "finds the said Michael Keenan or Teenan, and William Hood, guilty of falsehood, fraud, and wilful imposition as libelled; and therefore fines and amerciates them each in the sum of L.8 sterling, payable to the procurator-fiscal of Court *ad vindictam publicam*; and failing instant payment of said fines, decerns and adjudges the said pannels to be confined in the prison of Dumfries, there to be kept at hard labour . . . each for the period of sixty days from this date, unless said respective fines shall be sooner paid." The fines were paid by the pannels.

Craufurd stated the *first* ground of suspension. This was a serious charge, and ought to have been tried by a jury. It is the nature of the charge made, and not the amount of punishment prayed for, that affords the criterion for going to a jury. The decision in *Kerr or Williamson*, 8th April 1842, 1 Broun, p. 216, is not good.

This ground of suspension having been repelled by the Court—

Craufurd then stated the *second* ground. The prayer being for *imprisonment only*, the Sheriff could not competently under it pronounce sentence of *fine*. Further, the 19th section of 9 Geo. IV. c. 29,* requires, that the prosecutor shall conclude for the two alternatives; and such conclusion is in accordance with practice.

E. Maitland, for respondent. Substantially the sentence is within the prayer, the prayer being for imprisonment, and the sentence for the milder punishment of a fine within the proper amount. It further gave the pannel the option of going to prison if he did not choose to pay. But the sentence was put in this shape at the express desire of the pannels themselves, made through their agents. They voluntarily paid the fine, and cannot, after such acquiescence, and after a delay of a month and a half, insist in this suspension.

LORD JUSTICE-CLERK. If the proceeding was incompetent, acquiescence is of no avail. I confess I do not like to say anything to the effect that a Judge is to be tied down to the particular sentence asked by the prosecutor. But this was a complaint under a very special statute, where the punishment prayed for determines the competency of the prosecution. The prayer was for imprisonment only, and there being no alternative prayer, the question is, whether that does not limit the Judge to imprisonment? Then, if the sen-

* "In the prosecution of criminal offences before Sheriffs of counties in Scotland, where the prosecutor shall in his libel conclude for a fine not exceeding L.10, together with expenses, or for imprisonment in jail or in bridewell, not exceeding sixty days . . . it shall and may be lawful to proceed to try such offences in the easiest and most expeditious manner, without the pleadings or evidence being reduced into writing."

tence was incompetent, can we sustain it because the suspender has paid the fine? I do not see that he is barred. The great difficulty I have, is in saying, that the prosecutor has the power to limit the Judge in regard to the nature of the punishment. The complaint ought, undoubtedly, to have put the alternative within the power of the Sheriff; and the Sheriff might have refused to proceed on a complaint of this character. But still as he did proceed, the prayer excluded any other sentence. June 10. 1853.
Hood v. Young.

LORD WOOD. I think the objection good. The statute states the alternatives of fine or imprisonment. The prosecutor only asks for the specific punishment of imprisonment. On such an application under the statute, I do not think the Sheriff could pronounce sentence of any other character than the one prayed for.

LORD COWAN. The prosecutor was entitled, I hold, in the exercise of his discretion, to ask for either fine or imprisonment. But he asked only for fine. How then could the Sheriff impose the other punishment? The sentence could not go beyond the prayer.

LORD ANDERSON. I do not concur with Lord Cowan in holding this a perfectly regular complaint under the statute. I think the Sheriff might have objected that it limited his powers, and might have refused to proceed under it. But having gone on, his sentence ought to have been within the prayer.

The judgment was, "In respect that the prayer in the original complaint is for imprisonment only, while the sentence pronounced is for a fine: Pass the bill: Suspend the sentence complained of: Find no expenses due, and decern."

R. Arthur, S.S.C., Suspenders Agent.

Joseph Mitchell, W.S., Respondent's Agent. (J. M. M.)

FERGUSSON, PETITIONER.

No. 219.

11 and 12 Vict., c. 36, §§ 3, 27, and 28—*Entail Amendment Act, and Act of Sederunt, 23d December 1848—Pupil Heir—Tutors and Curators—Edictal Citation.*—A petition was presented under the Entail Amendment Act for the conveyance to the petitioner in fee-simple of a trust-estate—to which the consent of the three next heirs was requisite. One of these was a pupil, having no tutors curators or other legal guardians. The petition was served on him, but was not served edictally on his tutors and curators. Before such service was made the Court appointed a tutor *ad litem* to the pupil. After the petition had been remitted to the reporter it was served edictally on the tutors and curators of the pupil:—*Held*, that the defect in the previous service was not such as to render it necessary to appoint the tutor *de novo* before executing the deed of consent.

11 and 12 Vict., c. 36, § 6—*Entail Amendment Act—Affidavit.*—Under the same petition an affidavit was lodged, setting forth that there were no debts affecting "the fee of the residue directed to be set apart for the purchase of lands to be entailed:—*Held*, that such affidavit was a sufficient compliance with the 6th section of the Entail Act.

A trustor conveyed his whole estates to trustees, to be entailed on certain 1st Division parties. James Wright was, at the date of this application, vested in these June 11. 1853. estates as judicial factor for the purpose of carrying out the trust. The petitioner was the party who, if the entail had been executed in terms of the trust, would be the heir in possession. In that character he presented this petition, under the 3d, 27th, and 28th sections of the Entail Amendment Act, praying the Court, upon the necessary consents being granted, to grant war- Fergusson, Petitioner.

June 11. 1853. rant on the judicial factor to make over to him the trust-estate in fee-simple. Of the three nearest heirs whose consents are required by the Act to a disentail, two had given sufficient deeds of consent; the third was a pupil.

Fergusson,
Petitioner.

Mr W. Campbell, W.S., to whom the proceedings had been remitted, brought the following points under the view of the Court in his report:—"The Court by interlocutor of this date, 2d Dec. 1852, pronounced in the present application, appointed Alexander Kincaid Mackenzie to be tutor *ad litem* to the said William Fergusson Hole, the pupil. For the reason afterwards mentioned, a deed of consent has not yet been executed by Mr Mackenzie as tutor of the pupil. The requisites of the Entail Amendment Act appear to me to have been duly complied with, excepting in so far as pointed out in the following observations, which I now submit to your Lordship:—1. The said William Fergusson Hole, the pupil heir, has no tutors, curators, or other legal guardians. The petition was served on him, but was not served edictally on his tutors and curators. Before such service was made, the Court by their said interlocutor of 2d Dec. last, appointed Mr Kincaid Mackenzie his tutor *ad litem*, who appeared in Court and took the oath *de fidei administratione*. Of this date, 11th Feb. 1853, and since your Lordship remitted the petition to me, the petition has been served edictally on the tutors and curators of the pupil, and the *induciae* of that service have expired. Mr Mackenzie has not yet executed a deed of consent, and I have recommended that the execution of this deed should be delayed until your Lordship has an opportunity of considering whether, in respect of the defect in the previous service of the petition, Mr Mackenzie should not be *de novo* appointed before executing the deed of consent. As regards the necessity of an edictal citation of tutors and curators in the present case, I have to point out that the Act of Sederunt of 23d December 1848, which regulates the service of petitions under the Entail Act, does not contain specific provision with reference to the case of a pupil who has *not* a father, or tutors, or curators, or other legal guardians. But it seems clear, that the service is to be made in the usual manner, and this seems to be implied also in the third section, relating to a party in minority *having* a father, or known tutor, or curator, or other legal guardian, in which case it is provided that the petition 'shall, *besides being served in the usual form*, be also served on such father, or on one, at least, of such tutors, curators, or other legal guardians, in the same manner as if he were a party called.'

"2. The petitioner has, in terms of the 6th section of the Entail Amendment Act, produced an affidavit by himself, in which he deposes:—"That there are no entailor's debts, or other debts, and no provisions to husbands, widows, or children, affecting or that may be made to affect the *fee of the residue directed to be set apart for the purchase of lands to be entailed*.' I call your Lordship's attention to the terms of this affidavit, in order that you may consider whether it is sufficient compliance with the terms of the 6th section, to depone, That there are no debts or provisions affecting the *residue of the estate directed to be entailed*, or whether there should not have been an affidavit that there are no debts affecting the *trust-estate*. An affidavit in the latter terms would have afforded the evidence required by the Act, that the purposes of the trust prior to the disposal of the residue have been performed, and that the specific property proposed to be conveyed to the petitioner is free of all

claims upon it. The words used in the affidavit, if taken in their strict acceptation, do not seem to express so much, and in these circumstances I think it right to bring the matter under your Lordship's notice."

June 11. 1853.

Fergusson,
Petitioner.

The COURT were unanimously of opinion, that both as regarded the manner in which the pupil had been made a party to the proceedings, and with respect to the affidavit, the provisions of the Act had been sufficiently complied with.

John M'Craken, S.S.C.

(J. S. M.)

DALLAS v. MANN.

No. 220.

Process—Amendment of Libel—Relevancy.—Where an averment essential to the relevancy of an action has been omitted in the original summons and condescendence, it cannot be added on revisal, except in the form of an amendment of the libel on leave obtained.

Dallas raised action of damages in the Sheriff Court of Nairn against Mann, on the ground, that in furtherance of threatened revenge, and in the attempt to carry out some groundless hatred, malice, and ill-will, erroneously and groundlessly conceived by the defender against the pursuer, the defender had accused the pursuer to the procurator-fiscal of reset of theft, aggravated by Mann. falsely and maliciously averring that the theft itself had been committed by pursuer's daughter, in consequence of which his house was entered in virtue of a search-warrant. The original summons and relative condescendence contained no averment of want of probable cause, and the defender did not found upon this omission; upon revisal, however, this averment was added, and the record closed without any notice or objection on the part of the defender, whose only plea in law was,—That there being no grounds for the present action, the defender falls to be assolizied. The Sheriff assolizied the defender on the ground of want of evidence of the pursuer having made the charge and procured the warrant libelled.

2d Division.

June 14. 1853.

Dallas v.

The pursuer advocated, for whom—

Neaves, and Fark.

Monro, for respondent.

LORD JUSTICE-CLERK. Can we, under the recent Act, sustain an action where the essential averment of want of probable cause was introduced by the pursuer on revisal only, even though the defender allowed the record to be closed without objection or plea. We must consult the other Judges on this point.

The case was advised to-day.

LORD JUSTICE-CLERK. We have consulted the whole Judges; and are prepared to lay down a rule in regard to the general question which arises in this case. That rule is, that in everything which is of the essence of the action, whether in the averment of an essential quality, or of what is a proper ground of action, the summons and condescendence must be perfect and complete *ab initio*; and that no change can be introduced into the revised condescendence, which alters the summons, or the annexed condescendence (which is a part of the summons), in such matters. Such change can only be made by an amendment of the summons on leave obtained. This rule we are pre-

June 14. 1853. pared to enforce in regard to the pleadings in this Court, as well as in the Sheriff Court.

Dallas v.
Mann.

Such being the general rule which the Court is to enforce,—then we, in this Division, hold that in this case want of probable cause was of the essence of the action; and therefore, as the statement of it was omitted in the condescendence annexed to and forming part of the summons, it was incompetent to insert it by way of revisal merely, but that it could only be added as an amendment on leave granted. We hold that this averment was necessary to the relevancy of the action, and therefore, as the case came before the Sheriff, an essential averment was wanting; and on that ground we sustain the ultimate result of the Sheriff's interlocutor.

The COURT "recall the interlocutors complained of: Find that in the summons and condescendence therewith, which forms part of the summons, the want of probable cause was not averred: Find that such averment was essential in this summons, which discloses a case of privilege on the part of the defender: Find that such averment could not competently be added in the course of revisal of the summons, and could only be introduced as an amendment, on motion to that effect being made and granted: Therefore dismiss the action: Find the pursuer liable in the expenses in this Court, and of new in the Inferior Court," &c.

Wight and Livingstone, W.S., Agents for Pursuer.

Stein and Campbell, W.S., Agents for Defender. (J. M. M.)

No. 221.

ARGO v. SMARTS.

Suspension and Liberation—4 Geo. IV., c. 34, § 3, construction of—*Artificer*.—Sec. 3 of this statute authorizes criminal proceeding both, (1.) against any artificer, &c., who having entered into a written contract of service, "signed by the contracting parties," shall refuse to commence work under it: and, (2.) against any artificer, &c., who having begun to work, under contract of service "whether in writing or not in writing," shall desert his employer:—*Held*, that the latter part of this section comprehends the case of a workman deserting a service which he has entered upon in terms not of a verbal but of a written engagement signed only by himself.

High Court of Justiciary. This was a suspension by Argo of a conviction and sentence of imprisonment, pronounced against him by one of the Justices of Peace of Lanarkshire, June 16. 1853. upon a petition and complaint presented under 4 Geo. IV. c. 34,* by Messrs Smart, the respondents.

Argo v.
Smarts.

This complaint, founded upon an obligation by Argo to serve Smarts as a lath-splitter for two years, homologated and acted on by service for nine months, after which time he deserted their employment. The obligation,

* This Act provides in § 3, "That if any servant in husbandry, or any artificer, calico-printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person, shall contract with any person or persons whomsoever, to serve him, her, or them, for any time or times whatsoever, or in any other manner, and shall not enter into or commence his or her service, according to his or her contract (such contract being in writing, and signed by the contracting parties); or, having entered into such service, shall absent himself or herself, from his or her service, before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed; or neglect to fulfil the same; or be guilty of any other misconduct or misdemeanor in the execution thereof, or otherwise respecting the same: then and in every such case, it shall and may be lawful for any

however, was signed by Argo alone. The proximate cause of his desertion June 16. 1858. was this, that having injured his hand in the course of his work, and having in consequence been for five days absent, he had been refused wages for that ^{Argo v. Smarts.} time.

R. Thomson, for suspender. The proceedings here were under a strictly penal statute, and must not be extended by implication. Wherever a *written* contract of service is founded upon, it must be in terms of sect. 3, "signed by the contracting parties." The signature of Argo alone was not enough. Homologation may make an informal writing binding at common law, but will not bring it under the sanction of a penal statute. The second part of sect. 3 refers to contracts in writing, in terms of the Act, or to *verbal* contracts. There was no verbal contract founded upon in this case.

Craufurd, for respondents. The proceedings were not based upon a written contract which parties had never commenced to fulfil, but upon an engagement of service entered into and acted upon. Such a case is provided for in the second part of sect. 3, where the contract may be either "in writing or not in writing."

LORD JUSTICE-CLERK. This objection flies off when we look at the latter part of the third section. If over and above a mere verbal contract, a writing, though informal, be employed, I cannot think that this part of the statute does not apply.

LORDS WOOD and COWAN concurred.

Judgment was, "Refuse the bill; find the suspender liable in expenses," &c.

John Cosens, W.S., Agent for Suspenders.

Adam Paterson, W.S., Agent for Respondents. (J. M. M.)

CLARK AND OTHERS v. LOOS.

No. 222.

Arrestment—Admiralty—11 Geo. IV. and 1 Will. IV. c. 69, secs. 21 and 23, construction of—Ship—Maritime—Warrant of concurrence.—Held, that, since this statute transferring the Admiralty jurisdiction to the Court of Session, the ordinary warrant to arrest "goods and gear" is sufficient to authorize the arrestment of a ship.

Loos raised an action of damages against Clark and others, owners of the 2d Division brig *Jane Clark*, and, in virtue of an ordinary warrant to arrest, contained in June 17. 1858. the summons, arrested that vessel on 31st May, "to remain in the harbour at Glasgow under sure fence and arrestment, . . . aye and until sufficient Clark, &c. v. Loos. caution be found acted in the books of Council and Session, that the same shall be made furthcoming to the pursuers." This was a petition by the

Justice of the Peace of the county, or place where such servant in husbandry, artificer, &c. &c., shall have so contracted, or be employed, or be found; and such Justice is hereby authorised and empowered, upon complaint thereof made upon oath to him by the person or persons, or any of them, with whom such servant, &c., shall have so contracted, . . . to issue his warrant for the apprehending any such servant, &c. &c., and to examine into the nature of the complaint; and if it shall appear to such Justice that any such servant, &c., shall not have fulfilled such contract, or hath been guilty of any other misconduct or misdemeanor as aforesaid, it shall and may be lawful for such Justice to commit such person to the House of Correction, there to remain, and to be held to hard labour for a reasonable time, not exceeding three months," &c.

June 17. 1853. owners for recall of the arrestment, on the ground that, as it was used, not under a special warrant for arresting maritime subjects granted by the Lord Ordinary on the Bills, but solely in virtue of an ordinary warrant to arrest in the hands of third parties, it was an inept diligence.

Clark, &c. v.
Loos.

E. Gordon, for petitioners. The summons did not contain a special warrant to arrest maritime subjects. The pursuers ought, therefore, to have applied for warrant of concurrence from the Ordinary on the Bills, such as was formerly in use to be granted by the Judge Admiral. The practice is to do so; and it is the proper course under 11 Geo. IV., and 1 Will. IV., c. 69, enacting in sec. 23, "that the finding of caution and using of arrestments, heretofore observed in the High Court of Admiralty, and all regulations relative thereto, may be enforced in the foresaid Courts respectively" (i.e., the Court of Session and Sheriff Court,) and in sec. 21, that "all applications of a summary nature connected with such (i.e., admiralty) causes may be made to the Lord Ordinary on the Bills."

Logan, for respondent. The warrant to arrest "goods and gear" is sufficient to include ships since the transference of the admirals' jurisdiction to the Court of Session. A valid *nexus* has been laid on, though I admit a special application would be required to authorize the *dismantling* the ship; of the want of that we take the risk.

The LORD JUSTICE-CLERK. There is no trace of inserting in the summons a different warrant applicable to maritime subjects. To do so would be to introduce a very cumbersome form after a statute had been passed for the special purpose of simplifying procedure in these cases. The ordinary warrant to arrest must be applied *secundum subjectam materiam*.

The other Judges having concurred, the judgment was, "Repel the objection to the competency of the arrestment."

Webster & Renny, W.S., Agents for Petitioners.

D. J. Macbrair, S.S.C., Agent for Respondent. (J. M. M.)

No. 223. DUNDAS AND OTHERS (EARL OF STATHMORE'S TRUSTEES) v. HOOD AND OTHERS (KIRKALDY'S TRUSTEES.)

Landlord and Tenant—Lease—Trustees, liability of.—Circumstances in which trustees of a party deceased who had accepted and acted, and entered into possession of a lease held by the truster, were *Held* not to have so adopted the lease as to make themselves directly and immediately liable for all the tenant's prestations, including arrears of rents.

1st Division.

June 21. 1853.

Dundas, &c. v.
Hood, &c.

This was action at the instance of the trustees of the late Earl of Strathmore against the defenders, as the trustees of the deceased Patrick Kirkaldy, tenant of the farms of Fullerton, &c., and also as individuals, for arrears of rent alleged to be due by Kirkaldy to the pursuers at the time of his death. The following statement of the facts of the case, and also of the pleas of parties, is contained in a note subjoined by the Lord Ordinary (Rutherford) to his interlocutor in the cause:—

"Patrick Kirkaldy held a lease of the farms of Fullerton and Crathies, granted originally by Mr Patrick Murray of Simprim, but to which the pursuers acquired right as landlords, having purchased the property in 1832. The lease itself was granted in 1832, for nineteen years subsequent to Mar-

tinmas 1832, which was declared to be the entry to Patrick Kirkaldy, and to June 21. 1853. his heirs, 'secluding assignees, whether legal or voluntary, and sub-tenants.' Dundas, &c. v. Hood, &c. The farm was held by Kirkaldy under this lease, and the rents are admitted to have been satisfactorily settled for the year 1846, and previous years. For the rents of 1847, amounting, with interest of improvements, to L.960, 12s. 3d., and interest upon that rent, Kirkaldy had granted, and the pursuers had taken, his acceptances; one for L.500, dated the 1st of March 1848, and the other for L.460 : 12 : 3, dated the 4th August 1848. These bills appear to have been twice renewed, and the last renewals were current at Mr Kirkaldy's death on the 16th of July 1840.

Kirkaldy—a short time previous to his death, and probably from the increasing embarrassments in his affairs—executed a trust-deed in favour of the defenders, not of his whole property, but of his leases held under the pursuers, and of another lease held under Mr Lyell of Kinnordy, together with the whole stock and effects, &c. upon those farms. The purposes of the deed were, 1st, for payment of the necessary charges and expenses in the execution of the trust, and for payment of public and parochial burdens, rents, and disbursements relative to the farms; in the 2d place, for payment to his creditors of debts contracted prior to the trust, principal and interest, and that *pro rata*, but with a due regard to securities and preferences, on the same principle as if sequestration had been awarded of the date of the trust-deed, with power to the trustees to make dividends, but declaring that it shall be in the power of the trustees to pay in full, out of the first of the trust-funds, creditors the total amount of whose respective claims did not exceed the sum of L.25 sterling; 'and it shall also be in the power of my said trustees to satisfy and pay preferably out of the trust-estate the rent of the said farms of Fullerton and Crathies for crop and year 1847, although the landlords' right of hypothec has expired, provided they shall consider it for the interest of my creditors generally so to do, and provided the landlords shall consent to recognise my trustees as assignees of the lease, or agree to such other arrangement as shall be satisfactory to my trustees.' The 4th purpose of the trust gives power to the trustees to dispose of the leases, or to renounce them, settling and transacting with the landlords as to them might seem just. The deed provides also for the application of any reversion, for the assumption of creditors, ascertainment of debts, and various other usual purposes. The trust-deed, though granted on the 22d of June 1849, does not appear to have been delivered or acted upon during Kirkaldy's life, but he had been taking measures to secure the accession of his principal creditors, and there is accordingly produced in process a letter addressed to him, signed by several of the creditors, in which, after referring to the trust-deed, and expressing their conviction that it is the most speedy and least expensive method for their payment, they continue, 'We do hereby respectively accede and agree to and ratify and approve of the foresaid trust-right and disposition granted by you, and we hereby consent and agree to conform thereto, so far as we are respectively concerned; but declaring, that in case any of the creditors shall refuse to accede to the said trust, and shall adopt separate measures, then it shall be competent for each of us to use the like diligence, to prevent any undue preference.' The party first signing this letter of accession is Mr

June 21. 1853. Proctor, 'for the trustees of the late Earl of Strathmore, and for self.' Mr Proctor is factor for the trustees of Lord Strathmore. The accession of the creditors never was completed, and was finally superseded by the judicial sequestration. In these circumstances, Mr Kirkaldy died on the 16th of July 1849. The trust-deed was found in his repositories; and the defenders state, that finding the estate unprotected, and the trust-arrangement to a certain extent advanced, they proceeded to act with a view to the interests of all parties. There does not seem to be much dispute about what they did. They reaped the crop of 1849—they appear to have renounced Mr Lyell's lease—to have disposed to a certain extent of the stocking of both farms as well as of the crop, thrashing out the grain—to have laid down some winter wheat, and to have commenced otherwise the cultivation of the pursuer's farm for crop 1850. They had advertised also, it would appear, for the claims of creditors. But on the 23d of January 1850, one of Kirkaldy's creditors applied for sequestration, under the Act 2d and 3d of Her Majesty, cap. 41. And it may be observed that this course could not have been taken at an earlier date—the sixth month after decease having just elapsed. It was plain there could be no answer to this application; the deceased had left his affairs in embarrassment, and the trust-deed, while it did not extend to his whole property, contained clauses and provisions to which some of the creditors might have objected; sequestration was accordingly awarded; the defenders accounted for their intromissions to the judicial trustee—paying over to him the balance of any funds in their hands. It is not alleged that they misapplied or retained any funds.

It only remains to be stated that the rents for crop 1848, and subsequent years of the lease, appear to have been duly paid, and that the judicial trustee, with the consent of the pursuers—who did not avail themselves of the exclusion of assignees, legal and voluntary—continued in possession during the remainder of the lease.

It is in these circumstances that the pursuers have brought the present action against the voluntary trustees for the rent of the crop and year 1847. They found upon the cases of *Ross v. Monteath*, 8d February 1786, M. 15,290; *Nisbet and Company's Trustees*, 8th Dec. 1802, M. 15,268; *Cuthill v. Jeffrey*, 21st November 1818; and *Kirkland and Sharpe v. Gibson*, (Wilson & Son's Trustee,) decided in this Court 17th May 1831, and affirmed 25th March 1833; stating that the trustees having taking possession under the voluntary trust-deed, made themselves directly and immediately liable for all the tenants' prestations under the lease, including any rents in arrear. That the rents for 1847 were still in arrear, the last renewals of the bills which had been granted for those rents being current at the date of Kirkaldy's death, and the debt itself, expressly as arrears of rent for 1847, being acknowledged by Kirkaldy in the trust-deed, by which the lease was assigned, and under which the defenders acted. That the defenders' possession had fixed upon them their liability, of which they were not and could not be relieved by the subsequent sequestration. The defenders, although they deny the application of those cases to the present—do not dispute the principle which they involve, that the assignees to a lease, whether trustees or others, entering into possession, are liable to make good the tenant's prestations, including arrears of rent. They

maintain that in this case the rent of 1847 could not properly be considered June 21. 1858. in arrear, or as a prestation still due under the lease, the landlords having accepted the tenants' bills for these rents, the renewals of which were not payable for more than twelve months after the rent became due, and having thus disconnected the debt from the lease, and left it simply as a debt due by the tenant on his separate personal obligation. This plea is strongly met by the fact that the identity of the rent and the sum in the bills is not disputed, and that the debt is acknowledged in the trust-deed as arrears of rent. But it seems unnecessary to decide this point, as the defenders have occupied better ground in their other defences. They maintain, the Lord Ordinary thinks conclusively, that their intromissions in the circumstances cannot be considered as an absolute and final adoption of the lease, involving that extended liability for which the pursuers contend. That the trust-arrangement never was complete. That the pursuers must admit this who signed as acceding creditors, but under reservation that the other creditors should accede. That their waiver of their right of secluding voluntary assignees was conditional only, binding neither upon themselves, if the trust-arrangement fell to the ground, nor consequently upon the defenders. That the arrangement, in its own nature, was evidently subject to be superseded by judicial sequestration, and that the interference of the defenders in those circumstances, and until it was seen that the trust-arrangements would not be disturbed, was plainly an interim arrangement, while, as the only means of preserving the estate, it was evidently of great advantage to all concerned. That the pursuers themselves were parties, and necessarily parties to the sequestration which merged the voluntary trust, having accepted the judicial assignee, and waived in his favour their right of exclusion, while the arrears for the rent of 1847, or the bills granted for that rent, remained unpaid. That the pursuers' just remedy, if they had any, for those arrears, beyond ranking as ordinary creditors, was against the judicial trustee, and the creditors whom he represented, and who had with the pursuers' assent adopted the lease unconditionally and finally. That in such circumstances, and considering their own consent to or acquiescence in the sequestration, they could have no recourse against the defenders, in respect merely of the intermediate possession, which was the only ground of action, there being no allegation of liability in respect of funds misapplied or retained against the judicial trustee, yet the action was brought against the defenders alone, the judicial trustee not being even called as a party.

The Lord Ordinary is of opinion that the defence on the ground last referred to is unanswerable, and has had no hesitation in assoilzieing the defenders with expenses.

His Lordship, therefore, "finds that though the defenders accepted and acted under the trust-deed after the death of the late Mr Kirkaldy, and entered into possession of the farm held in lease by him of the pursuers, such arrangement depended, and was conditional upon the accession of the whole creditors of the deceased: Finds that the trust-deed, and the defenders' right and possession under it, were superseded by the judicial sequestration of Mr Kirkaldy's estate, which was applied for under the statute the 2d and 3d Vict., chap. 41, by one of the non-acceding creditors, as soon as the Act permitted, and was acquiesced in and assented to by the pursuers themselves: Finds

Dundas, &c. v.
Hood, &c.

June 21. 1853. that the defenders' possession, in such circumstances, does not infer the liability contended for by the pursuers: Finds, generally, that the pursuers Dundas, &c. v. Hood, &c. have stated no ground of action relevant to support the conclusions of the summons; therefore sustains the defences, assoilzies the defenders, and decerns: Finds the pursuers liable in expenses, allows the defenders to give in an account of their expenses, and remits the same, when lodged, to the Auditor to tax and to report."

The pursuers reclaimed.

Dundas, and Neaves, appeared for the reclaimers.

N. C. Campbell, and the Dean of Faculty, for the respondents, were not called on.

The Court "adhere," with additional expenses.

Dundas & Wilson, C.S., Pursuers' Agents.

Davidson & Syme, W.S., Defenders' Agents.

(J. S. M.)

No. 224.

FRASER v. BANNERMAN.

Bill of Exchange—Indorsation—Summary Diligence—Grounds and Warrants—Banking Company.—A bill of exchange contained the following indorsations. The first was by the payee: "Pay to the Agent for the North of Scotland Banking Company at Macduff, or order." The next was: "Pay to the Manager, North of Scotland Banking Company, Aberdeen, or order. (Signed) Robert Adam, agent:—*Held*, That these indorsements, as requiring extraneous evidence to explain them, were not such as to render summary diligence on the bill competent; and therefore charge by an assignee to the bill and registered protest taken at the instance of the manager of the Banking Company suspended simpliciter.

1st Division.

June 22. 1853.

Fraser v.
Bannerman.

This was a suspension of a charge on a bill for £153 : 6 : 8, payable at six months, drawn by Alexander Lillie, draper in Banff, and accepted by the suspender Fraser, with others. The charge was given at the instance of George Bannerman, solicitor in Banff, as alleged assignee of James Westland, manager of the North of Scotland Banking Company of Aberdeen. The bill was indorsed by the drawer Lillie in the following terms: "Pay to the agent for the North of Scotland Banking Company at Macduff, or order. (Signed) Alex. Lillie." The next indorsement was: "Pay to the manager, North of Scotland Banking Company, Aberdeen, or order. (Signed) Robert Adam, agent." It was protested for non-payment "at the instance of James Westland, manager of the North of Scotland Banking Company in Aberdeen, the indorsee and holder thereof." Westland, who is the registered officer of the Company, assigned the bill and diligence to Bannerman, who charged the acceptor. Fraser, the suspender, *inter alia* pleaded, that the indorsations were invalid and insufficient to warrant summary diligence, in respect there was no indorsation either to Westland or to Adam *nominatim*, the only indorsations being in favour of a person only descriptively designated.

The Lord Ordinary, (Robertson,) in respect the bill charged on bears an indorsation "without any specification for whom the said Robert Adam is agent or where he is agent, so that there is nothing to identify him with the special indorsation by Lillie, that the protest is at the instance of James Westland, manager of the North of Scotland Banking Company in Aberdeen, but does not bear to be for behoof of the said bank, while the in-

indorsation must be held, if valid, to be one in favour of the bank, and, there- June 22. 1853.
fore, in respect the grounds and warrants of the diligence are not apparently
and manifestly entire, and, on the authority of the cases of *Smith v. Selby*, ^{Fraser v.}
10th July 1829, and *Summers v. Marianski*, 16th December 1843, Suspends ^{Bannerman.}
the letters and charge *simpliciter*, and decerns: Finds the suspender entitled
to expenses," &c.

In a note his Lordship stated :—" However effectual the bill charged on may be as the ground of an ordinary action, and without determining the abstract point that the indorsation to the manager of a banking company, without specifying any name, is, in all circumstances, insufficient to warrant summary diligence, the Lord Ordinary proceeds upon the whole specialities of the case. He does not think Westland's title to the bill sufficiently deduced, *ex facie* of the diligence, nor the protest strictly conformable to the assumption which the charger must make, of the banking company being the only creditor."

The charger reclaimed; and the case was argued both orally and in written pleadings, and—

This day was advised.

Patton, appeared for the reclaimer.

Penney, for the respondent.

THE LORD PRESIDENT. It is of very great importance that we should not do anything to impair the efficacy of that valuable part of our law which allows summary diligence on bills, thereby preventing the freedom of commerce on bills. On the other hand, it is equally important that we should not allow it to get into laxity or be abused. Now, in regard to bills, there are various ways in which they may be effectually indorsed. The question before us at present relates, not directly to whether there is a right indorsement on this bill, such as to vest a valid right to it, but it relates entirely to the question of summary diligence, and I do not wish to go farther in this case than what is necessary to deal with this question. In reference to the indorsation by Lillie, it seems to have been a blank indorsement converted into a special one, by a stereotyped form being filled in over it—the name of the place where the agency is being the only word not stereotyped; and it is said, if the bank is not allowed to have in the possession of all its agents, and to fill up, this form, we oppose such an impediment to the traffic in bills that it cannot go on. Now, in dealing with the question of law that arises here, one difficulty I have about the species of indorsation we have now to deal with being a ground for summary diligence, is, that it does not designate any person by name. You do not get at the agent by any legal or statutory authority, as you can the registered officer of the company. It was pressed on us that the indorsation was good, although the party was not named. That view may go on any length. It is said the proper way is to investigate in the suspension whether the party bore the character of agent. But we must have the thing properly set forth. No doubt there are cases in which the liability of the party does not appear by his name on the bill, *e.g.*, when the bill is indorsed by a company firm, and diligence done against the partners of that firm; their name does not appear, that is, their christian and surname; but their name as they choose to write it appears; and it will not be contended that a note indorsed to that firm can be protested, and diligence

June 22. 1858. done at the instance of any one partner, although any one partner may be liable for the debt. Therefore, I doubt that class of indorsation being the ground for summary diligence, even if it had been done here at the instance of Adam himself. But Adam indorses it away. I do not know whether he was agent at Macduff. He might have been agent at some other place. He is not connected sufficiently with the indorsation. I think that on principle we are not here out of the case of *Summers v. Marianaki*. The principle of identification is the same. This sort of indorsation being intended to be ambulatory, will not do as a warrant of summary diligence. I go even farther than this, that when the bill was in the hands of the company at Aberdeen, it was not in a condition in which summary diligence could go on it.

Fraser v.
Bannerman.

LORD FULLERTON. It appears to me that the interlocuter of the Lord Ordinary is well founded, and I cannot help thinking that the confidence with which the opposite view is maintained by the charger arises from confounding two matters essentially distinct, namely, the competent form of transferring a right to a bill or promissory note, and the competent form of effecting that transference, in such a way as to warrant summary diligence at the instance of the assignee. That these things are distinct there can be no doubt. There are many ways of transferring the obligation contained in a promissory note or bill; but the mere transference of the right will most certainly not in all cases support summary diligence; and, accordingly, there is no more common reason of suspension than that the only competent process is by ordinary action. In every case, then, where the question is raised, one must look to the statutory origin of summary diligence as applicable to these favoured writings, and ascertain how far each particular case may, from the form of procedure adopted, fall within the description of the statute. The Act 1621, c. 20, afterwards extended by subsequent statutes to inland bills, enacts, "That in case of any foreign bill of exchange from or to this realm, duly protested for non-acceptance or for non-payment, the said protest, having the bill of exchange prefixed, shall be registrable within six months after the date of the said bill in case of non-acceptance, or after the falling due thereof in case of non-payment, in the books of Council and Session, or other competent judicatures, at the instance of the person to whom the same is made payable, or his order, either against the drawer or the indorser in case of a protest for non-acceptance, or against the acceptor in case of a protest for non-payment, to the effect it may have the authority of the judges thereof interponed thereto, that letters of horning upon a simple charge of six days, and executorials necessary, may pass thereupon, for the whole sums contained in the bill, as well exchange as principal, in form as effairs, sicklike in the same manner as upon registrate bonds, or decret of registration proceeding upon consent of parties." Now the important thing to remark here is, that the bill shall be registrable at the instance of the person to whom the same is made payable, or to his order. To support summary diligence then, there must be a good instance of the person to whom the same is made payable, in order that the authority of the judges may be interponed thereto. Now, can it be said that there is a good instance, or indeed any instance at all, if the name of the party to whom the bill is payable is kept back; and if that party has no such legal designation as to supply the absence of a name? I should say

most certainly not.—The protest here is at the instance of James Westland, June 22, 1853, manager of the North of Scotland Banking Company in Aberdeen, but the original indorsation by the holder of the bill is to “the agent for the North of Scotland Banking Company at Macduff, or order, signed Alexander Lillie,” and it appears from the subsequent indorsation that Robert Adam was, or held himself out as being the agent for the North of Scotland Banking Company at Macduff, and so was entitled to hold the transfer under the original indorsation. But, I rather demur to this strain of argument—just let it be supposed that there had been no indorsation by Adam to Westland the manager of the North of Scotland Banking Company, could Robert Adam have used summary diligence on an indorsation in which he was generally described as “agent for the North of Scotland Banking Company at Macduff,” could that general designation be a good instance in terms of the statute? And if he added his name, there would have arisen the additional objection, that that was not warranted by the terms of the indorsation, and for anything appearing on that indorsation the agent might have been somebody totally different. In short, I consider the principle of summary diligence as warranted by the statutes to be, that the claim of indorsation must present a series of names terminating in the holder, at whose instance there may be a valid registration in terms of the statute. It is no doubt quite true that in some cases the transference of the right may be complete, though there is a defect in the series of transmissions by which the successive legal possession of the document and the consequent competency of summary diligence may depend. In this very case for instance, the indorsation to the agent for the North of Scotland Banking Company at Macduff might have been a perfectly good transference of the right to the North of Scotland Banking Company; for a conveyance to an agent, *qua* agent, is substantially a conveyance to the company; but does it follow that the company could have used summary diligence on this document? I think most certainly not. They might have raised an ordinary action, setting forth that Robert Adam was their agent: But, as the bill and indorsation stood, there was nothing connecting the bank with the right of possession of the document; and consequently, there was no instance capable of supplying the requisite instance.

LORD IVORY. I am of the same opinion. I had an opportunity of laying down very much in detail the grounds of my opinion in *Summers v. Marianski*; to every word of which I adhere. The principle in regard to summary diligences is this, that the title must appear on the face of the bill: nothing must depend on extraneous evidence. But here there was no indorsation to Adam as the bank agent. It is enough for a suspender to say that the right in the party who comes forward is a right which is not supported by anything on the face of the document: it requires extraneous proof to keep it up; and when that is the case, summary diligence is not the remedy, but ordinary action only.

LORD ROBERTSON adhered to his previous opinion.

The COURT “find it unnecessary to decide as to the effect of an indorsation to the registered officer of a bank, and with this qualification, adhere to the interlocutor of the Lord Ordinary, . . . find additional expenses due,” &c.

Isaac Anderson, S.S.C., Charger's Agent.

Gibson-Craig, Dalziel, and Brodie, W.S., Suspender's Agents. (J. S. M.)

No. 225.

THORBURN AND TRUUMAN *v.* HOBY AND Co.

Process—Proof—Commission and Diligence.—Pursuers having obtained commission and diligence for exhibition of certain books, in order that excerpts might be taken therefrom “having reference to the pursuers and their iron securities,” and the books having been produced by the haver, and certain entries extracted therefrom, but not all the entries bearing upon the pursuers and their iron securities, the defender then called upon the haver to produce excerpts of these remaining entries, but the commissioner refused to allow this production:—*Held*, on appeal against this deliverance, that the defender was entitled to obtain excerpts of the remaining entries falling under the diligence.

2d Division. In this case the pursuers, Thorburn and Trueman, obtained commission and
 June 22. 1853. diligence “for exhibition of the book or books of the Western Bank of Scotland, and particularly a book or books entitled ‘iron securities,’ in order that copies or excerpts may be taken, and duly certified, of all entries therein having reference to the pursuers and their iron securities.” Under this diligence, one of the bank clerks produced the iron securities’ book, and excerpts of certain entries were taken therefrom. He was then “interrogated for the defenders, whether the above excerpts contain all the entries in the books of the bank having reference to the pursuers or their iron securities? Depones, These excerpts do not contain all the entries in the said iron securities’ book, and there are many other such entries. The agent for the defenders then requested the commissioner to call upon the haver to produce excerpts of all the remaining entries in the said iron securities’ book falling under the diligence, in order that the diligence may be exhausted, and objected that the excerpts produced do not exhaust the diligence. To which request and objection it was answered for the pursuers, that the excerpts produced are all that they want under the present diligence, and the commissioner has no power to make such a call.” The commissioner declined to call for the required production, whereupon the defenders appealed to the Court. The defenders’ agent then “called upon the haver to produce excerpts of the said remaining entries in the said iron securities’ book. To which it was objected for the pursuers, that the defenders had no diligence to entitle them to make such a call. The commissioner refused to allow the haver to be called upon to produce such excerpts.” The defenders appealed to the Court.

Broun, in support of the appeal, referred to *Dunlop’s Trustees v. Belhaven*, 29th May 1852.

Buchanan, for pursuers. That case is not in point; for here the defenders had previously a diligence of their own, which is now exhausted, for recovery of all entries they thought material. They cannot be allowed in our diligence to get what they ought to have got under their own.

The LORD JUSTICE-CLERK. In the execution of a commission and diligence, the parties are apt to forget that it is the same as if the havers were brought into Court. If you require a person to produce a book, and examine him as to the entries in it, the opposite party is entitled to cross-examine him, and to desire him to turn to any entries that may neutralize those already read. This right depends upon the broad principles of the law of evidence, which apply equally to the examination of havers or witnesses before trial or at

trial. I go on much broader grounds than those read to us from the case of June 22. 1853. *Dunlop's Trustees.*

Accordingly, the COURT "Alter the deliverance of the commissioner : v. Hoby & Co. Remit to him to follow out the examination begun by the defenders, and allow them to obtain excerpts of the remaining entries falling under the diligence : Reserving all questions of expenses."

John Cullen, W.S., Pursuers' Agent.

Gibson-Craig, Dalziel, & Brodie, W.S., Defenders' Agents. (J. M. M.)

FERRIE v. FERRIE.

No. 226.

Appeal—Petition to apply judgment—Expenses.—A regular petition to apply judgment is necessary in order to get decree for costs awarded by the House of Lords.

In this case the House of Lords on 25th November 1852, (see *supra*, p. 6,) 2d Division. affirmed the judgment of the Court of Session with costs, and remitted the June 22. 1853. cause "back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the Bills during the vacation, to issue such summary process or diligence for the recovery of such costs, as shall be lawful." *Ferrie v. Ferrie.*

A written note was boxed to the Lord Justice-Clerk, stating that the judgment of the House of Lords had not yet been applied, and requesting his Lordship "to move the Court to apply the said judgment, and to decern and ordain the pursuer to make payment to the defender" of £320, 10s., being the costs of the appeal, "as well as of the additional modified sum of £4, 14s., being the expenses incurred in reference to this motion as set forth in the annexed note of the same."

T. Mackenzie appeared to-day to support the motion.

The LORD JUSTICE-CLERK. As you have expenses to get under the judgment of the House of Lords, you must move by a regular petition to apply that judgment.

Motion dismissed.

Gibson-Craig, Dalziel, & Brodie, W.S., Agents. (J. M. M.)

CRAVEN v. ELIBANK'S TRUSTEES.

No. 227.

Tutor-dative—Pupil—Foreigner.—No one should be appointed tutor who is not amenable to the jurisdiction of the Scotch Courts.

The original pursuer of a reduction having died, his pupil son, and tutor-dative were sisted as pursuers. The tutor-dative was an Englishman, not amenable to the Court of Session, who, accordingly, sisted a mandatory. June 23. 1853.

LORD JUSTICE-CLERK. A tutor-dative ought always to be amenable to our jurisdiction. I wish this taken notice of, because such appointments are made in Exchequer on the mere suggestion of the parties as a matter of course, unless a caveat is lodged. No person should ever be tutor who is not amenable to our jurisdiction. *Craven v. Elibank's Trustees.*

(J. M. M.)

No. 228.

HARVEY v. LINDSAY AND OTHERS.

Servitude—Curling—Dedication—Custom—Prescription.—A right of curling, &c., on a loch situated within the private grounds of a landed proprietor is not a servitude which can be enforced against the proprietor; and although the recreation may have been enjoyed for upwards of forty years, this does not imply dedication in favour of the public.

1st Division.

June 24. 1858.

Harvey v.
Lindsay, &c.

This was a suspension and interdict at the instance of Mrs Harvey, proprietrix of the estate of Castle Semple, including the loch of Castle Semple situated within the policy attached to the mansion house, and was directed against the respondents, inhabitants of the neighbouring village of Lochwinnoch, on the ground that they "have lately been guilty of trespassing on the complainer's said lands, and on the loch in winter when frozen over, by curling, skating, and sliding on the loch, and for this purpose they are in the habit of breaking down hedges and fences, and going over enclosures, and through the complainer's private property generally, in various directions, in order to obtain access to the loch for the purposes mentioned, and this notwithstanding what is above set forth, and the repeated remonstrances of the complainer and her servants, and their endeavours to prevent them."

Answers were lodged by two feuars in or near the village of Lochwinnoch, and by certain other inhabitants of that village. They alleged that the loch is a public loch, and that for forty years and upwards prior to the institution of this process, it had been so dealt with, and they claimed as a servitude the right or privilege of resorting to the loch when frozen over in winter for curling, and skating, and sliding, and walking on the ice. This privilege or servitude was claimed alternatively for, 1st, the public generally; or 2d, at least for the feuars and inhabitants of the town or village of Lochwinnoch and the parish of Lochwinnoch.

The Lord Ordinary, (Wood), sustained the reasons of suspension, and made the interdict perpetual.

The respondents reclaimed, for whom—

Macfarlane, and the *Dean of Faculty*. Although the servitude claimed is not amongst the nominate servitudes, it does not follow that it is not to be recognised. Servitudes may be of any description. E. 2, 9, 1, S. 2, 7, 5. Bell's Pr. sec. 981. This principle is recognised by Lord St Leonards in *Dyce v. Hay*, House of Lords, 28th May 1852. The principle of the decision in that case was, that the servitude claimed was destructive of property. This one is not so; it may easily be made the subject of regulation, and in this respect it comes very near the right of golfing; *Magistrates of Earlsferry v. Malcolm*, 12th June 1829; 7 S. 755. The Court is not precluded from entertaining it by any principle of law. It is not necessary that there should be a positive grant of the right; by immemorial usage grant is presumed; *Thorburn v. Charteris*, 4th Dec. 1841, 4 D. 169; *Home and Milne v. Young and Others*, 18th Dec. 1846, 9 D. 286; *Dempster v. Cleghorn*, 2 Dow, 40; *Breadalbane*, 7 Bell's Ap. Cases, 43. Curling is one of the ancient national sports of Scotland. There is a presumed dedication to the public of the loch on which it takes place. The principle of English law supports this claim; 1 Livin's Reports, 176; Petersdorff's Abridgement, vol. 7, p. 486, *voce* custom. This principle has been recognised in Scotch cases. The inter-

mittent nature of the right of curling is no argument against it; nor is the fact of there being no particular access to the loch, for the recreation takes place at a period of the year, when, if there be gates in the fences, a road is of no consequence. June 24. 1853.
Harvey v.
Lindsay, &c.

Patton, and *Neaves*, for the suspender. This is not a servitude coming under any class of that species of rights. On the contrary, it is an invasion of a proprietor's rights; no matter although it does little injury. A custom is not a dedication. When a proprietor gives a portion of his ground for a village square, or the right to a well, these are intelligible things. He divests himself of the subjects. But here there is no dedication which amounts to an unequivocal surrender of the subject: it is toleration merely. The right of curling has never hitherto been recognised as a known servitude.

LORD ROBERTSON. The loch in question is admitted to be the private property of the complainer. The right claimed is rested on mere usage. The respondents say that they have, for upwards of forty years, without interruption, "exercised and enjoyed the game of curling, as also the amusements or recreations of skating, sliding, and walking on the loch, when covered with ice of the requisite strength." It is not alleged that there is any written grant to this effect. The pastimes referred to are certainly of a very ancient character, but no written grant of any such privilege is stated to have existed in any case, and there is no trace of any such claim of right in any of our law books or decided cases. It seems impossible to maintain that there is here any prædial servitude, or that the right of the respondents, as feuars or inhabitants of the town or parish of Lochwinnoch, is one whit stronger than that of the public at large. In the case of *Rogers v. Harvey*, the claim, which was disallowed, was that of walking within Harvey's ground, "for the convenience, comfort, and recreation, and health of the pursuers and their families, and other inhabitants, and others foresaid, who shall resort to the foresaid piece of ground, and road or path." In the more recent case of *Hay v. Dyce*, the Second Division and House of Lords disallowed the claim by an inhabitant and one of the magistrates of the burgh of Old Aberdeen, founded on a usage of the inhabitants of that and other places resorting, for upwards of forty years, "to the lands of Seaton, for the purpose of recreation, and taking air and exercise by walking over and through the same, and resting thereon as they saw proper."

While these claims were in both cases held incompetent, the usage as to a right of way was, on the other hand, held as a known servitude capable of being established. Had the respondents, therefore, in the present case, claimed the recreation of walking for exercise, lounging, and resting on the lands of Castle Semple, on an alleged usage of forty years, this would undoubtedly have been incompetent. But it would seem to be a singular result to hold that there might be a right of recreation on the loch when frozen, competent to be established by mere forty years' use, and no right of recreation on the land competent to be established by the same usage, or rather by usage to a far greater extent. It was said, indeed, that the privilege claimed in the case of *Dyce* was more extensive than the present, because it might be enjoyed at all times of the year, whereas the privilege of curling, skating, and sliding, was necessarily of short endurance. But this seems to tell more strongly

June 24. 1853. against the claim, because it shews that the encroachment not resisted was of less importance. I view the alleged usage to have been mere tolerance on the part of the proprietor. He might, for his own enjoyment, or purposes, or good neighbourhood, or popularity, have allowed these sports to take place every winter when the ice was bearing. But if he chose to alter his views upon that subject, to drain the loch, or to sell the ice, or to take portions of it for his own use, it would be very singular to hold that he was restrained from so doing by a legal right in the public to prevent such uses of his private property. Suppose a proprietor for forty years had allowed the public access once a week to view the scenery in his grounds, or every summer a regatta on his lake, or the inhabitants of an adjoining village and the public to gather nuts every autumn in his wood, or hunting or coursing over his lands, would he not be entitled to put an end to such usage? Some people might deem that this was harsh, and perhaps the curling clubs of Scotland think the conduct of the complainer very unhand-some; others who do not approve of such games, and still less of what occasionally accompanies them, may think it for the public advantage that they should not be allowed. But the matter before the Court is one of pure legal right, and cannot be affected by such considerations. If the case cannot be supported as one of servitude, far less do I think the principle of what has been called dedication can apply. It has no resemblance to bleaching, or the use of a well, or to the village green—a space left vacant by the proprietor in the plan of the village. It is not pretended that the public could in this case come to the loch when it is not frozen, or that they could prevent the proprietor from doing any act in the enjoyment of that property excepting when it is in this rare position. It is, or may be, entirely enclosed. His privacy cannot be encroached on. The public cannot sail on the loch or fish in it; and all they claim is a right to curl, skate, and slide. A possession so slight is surely matter of mere indulgence, and to say that Lochwinnoch is a subject abandoned by the proprietor and dedicated exclusively to curling, skating, and sliding seems to me little short of preposterous. There was much more reason, considering the extent of the encroachment, for applying the principle of dedication, or what Lord Cockburn called the servitude of recreation, in the case of *Dyce*, than in the present. The case of golfing is certainly that which comes nearest the present, and on that subject I have merely a few words to add. In the case of *St Andrews*, the links were the property of a Royal burgh, held by them for the benefit of the community, and in the feu disposition to Lord Kellie, there was an express reservation that no hurt should be done to the golf links, which were reserved entire for the comfort and amusement of the inhabitants. The case of *Earlsferry* is a very special one. There was in that case also a Royal burgh, and a dispute existed as to the marches of the golfing links, and the property of Sir M. Malcolm, whose titles do not appear to have been very distinct. The interlocutor of Lord Alloway is very specific, and on the whole no general principles can be deduced from the decision, although certainly it is but fair to admit that golfing is loosely talked of as a servitude. I cannot think, however, these cases afford any ground for extending the principles either of the law of servitude, or that of dedication, to such a case as the present. The case of *Burntisland* (fully explained in Lord Cun-

ingham's note in *Horne v. Young*,) as decided by the first Lord Meadowbank, June 24. 1853. also clearly brings out the principle; "the subject has been held in all times as destined for the public resort of the inhabitants generally, and of the neighbourhood, and of the public for exercise, pastimes, and various accommodation." This is exactly like the village green. On the whole, therefore, I think the interlocutor of the Lord Ordinary is well founded.

The rest of the Judges concurred.

The COURT "adhere," with additional expenses.

Shand and Farquhar, W.S., Agents for Complainer.

Alexander Cassels, W.S., Agent for Respondents.

(J. S. M.)

PETITION, SIR JOHN STEWART RICHARDSON OF PITFOUR, BART. No. 229.

Entail—Improvements—Montgomery Act—Entail Amendment Act, § 26.—In a petition by an heir of entail in possession of an entailed estate for authority to uplift and apply consigned money in payment *pro tanto* of the whole sums expended by him in improvements under the Montgomery Act—but which consigned money did not amount to the full value of the three-fourths of such expenditure to which by the said Act he was entitled to repayment: Authority was given to uplift and apply the consigned money, but only in payment *pro tanto* of the three-fourths and not of the whole expenditure: and question, (1.) whether § 26 of the Entail Amendment Act is limited in its operation to improvements under the Montgomery Act, or applies to any improvements however extensive; and, (2.) whether, when decree has been obtained for improvements under the Montgomery Act, the heir is entitled under § 26 of the Entail Amendment Act to go back on such improvements and claim payment of the fourth not covered by the Montgomery Act.

Sir John Stewart Richardson, Bart., is heir of entail in possession of the 1st Division. lands of Pitfour and others, in Perthshire, to which are attached salmon June 24. 1853. fishings in the Tay. This petition set forth, that by certain operations of the Tay Navigation Commissioners, injury had been done to these fishings, and that by decret arbitral, the amount of compensation to which the petitioner is entitled in respect thereof, had been fixed at the sum of £4,665. This sum had been consigned in bank in name of the petitioner, for behoof of himself and the succeeding heirs of entail, in terms of 11th Geo. IV., and 1 Will. IV. cap. 121, subject to the orders of the Court. And the petition farther stated that the petitioner has expended under the Montgomery Act in improvements upon the estate £4,717 : 7 : 10, and on the mansion house £3,711 : 10 : 10, amounting in all to £8,428 : 18 : 8; that he has obtained decree to that effect, and declaring him creditor to the succeeding heirs of entail for the sum of £3,538 : 3 : 1½, being three-fourths of the expenditure on the estate, and for the sum of £2,783 : 13 : 1½, being three-fourths of the expenditure on the mansion house: That by the 11th and 12th Vict., cap. 36* the petitioner is entitled, with the approbation of the

* Section 26 enacts, "That in all cases where money has been derived, or may hereafter be derived, from the sale or disposal of any portion of an entailed estate in Scotland, or of any right or interest in or concerning the same, or in respect of any permanent damage done to such estate, under any private or other Act of Parliament, or where any money has been invested in trust for the purpose of purchasing lands to be settled upon the series of heirs entitled to succeed to such entailed estate, and where such money would fall to be invested in lands or heritages to be entailed on the same series of heirs as are called to the succession of such entailed estate by the tailzie thereof, and under the same prohibitions, conditions, re-

June 24. 1853. Court, to apply the said sum of £4,665 in repayment, *pro tanto*, of the sum so expended by him on improvements, and it therefore prayed the Court on the usual intimation to authorize him "to uplift and apply the same in repayment, *pro tanto*, of the aforesaid accumulated sum of £8,428:18:8 expended by him in improvements on the said entailed estate of Pitfour and others as aforesaid," &c.

Petition, Sir
J. Richardson.

The reporter to whom the case was remitted, stated that "in all previous applications which have been remitted to me, where authority has been prayed for under the 26th section of the entail Act, to apply consigned money in repayment of sums expended on improvements, and where a claim, in respect of such expenditure, has been constituted under the Montgomery Act, the petitioner has prayed for authority to apply the consigned money in payment only of the three-fourth parts of the expenditure which forms the claim under the Montgomery Act, not in payment of the whole expenditure; and accordingly, in all these cases, after authority has been granted and the money paid, the creditor has discharged the claim under the Montgomery Act to the full extent of the sum paid, not to the extent only of three-fourths of that sum, to which extent only the claim under the Montgomery Act would fall to be discharged if the money were applied towards payment of the whole expenditure."

Wood, in support of the petition, referred to *Arniston*, 19th May 1849; and to a previous case of *Richardson*; both unreported.

The LORD PRESIDENT. This case raises some points of considerable importance, and if the determination of these points had been necessary, I should have proposed to consult the whole Judges of the Court, in order that a fixed rule might be laid down in regard to them, but I think the determina-

strictions, and limitations as are contained in such tailzie; and where the heir in possession of such entailed estate could, by virtue of this Act, acquire to himself such estate in fee-simple by executing and recording an instrument of disentail as aforesaid, it shall be lawful for such heir to make summary application to the Court, in manner hereinafter provided, for warrant and authority; and the Court, upon such application, shall have power to grant warrant and authority to and in favour of such heir of entail for payment to such heir of such sums of money as belonging to himself in fee-simple; but if such heir of entail shall not be entitled to acquire such estates in fee-simple, then it shall be lawful for such heir, with the approbation of the Court, to lay out such money, or any portion thereof, in or towards payment of entailer's debts, or in or towards payment of any money charged on the fee of such entailed estate, under this or any other Act, or in redemption of the land-tax affecting such entailed estate, or in permanently improving the same, or in repayment of money already expended in such improvements; and in such case such heir shall apply summarily to the Court, in manner hereinafter provided, setting forth the amount of the sums proposed to be laid out, and the special purpose to which it is intended to apply the same; and if the Court shall be satisfied of the propriety of the proposed application, they shall issue a finding or decree to that effect, and authorising such application, and it shall thereafter be lawful for the heir so applying to lay out such money, or any part thereof, according as the Court shall have authorised the application of the same, to all or any of the before-mentioned purposes; and if there shall be any surplus of such money after the purposes authorised by the decree of the Court shall be fulfilled, the same shall, if more than £200, be applied as the whole money would have been applied but for the provisions of this Act; and if less than £200, shall be paid to the heir of entail in possession of such entailed estate for the time, for his own use and behoof."

tion of these points is not necessary for the disposal of this petition. The June 24. 1853. 26th section of the Entail Amendment Act is very peculiar, and very large in its terms. And one question that arises here, is, whether it is intended to apply to any improvements however extensive, or whether it is limited to that class of improvements falling under the Montgomery Act. In the case of *Richardson*, the Court did sustain the application of such sums of money towards payment of improvements not provided for under the Montgomery Act. No doubt the sum was not large, still some money was so applied, and the Court thereby sanctioned the principle, and therefore that case is a precedent for applying such sums of money in that way. And perhaps it was the intention of the legislature not to limit the discretion of the Court to those things which were considered a hundred years ago to be improvements on an estate; while now in the progress of society and of opinion, there may be improvements considered more valuable and important. At the same time, when I see that the case of *Richardson* does not appear to have undergone much discussion, I would have thought it important to have the opinion of the whole Court as to the scope of this clause, so as to have the matter authoritatively settled. But that is not necessary for the disposal of this petition, so far as the petitioner now desires its prayer to be granted. There is a second point on which, had it been necessary for the disposal of the petition as it now stands, I would also like to have had the opinion of the whole Court. It is this, whether when improvements have been made under the Montgomery Act in the regular course of proceeding by notice to the heirs of entail, and they have tacitly consented to it, on the understanding that one-fourth of these improvements was to be paid by the heir himself—whether, after decree of declarator has been obtained, it does not become a concluded transaction between the parties which they cannot revive again—or whether, under this clause, that which was formerly a claim is now a fact, and the petitioner is still entitled to go back on these improvements, and to get payment of the fourth not covered by the Montgomery Act. There is no prescription here, for there is no debt. It is a fact that a certain sum of money has been expended in improvements. Now, the question is, whether under this present Act the petitioner can go back and rear up the debt into a claim against the estate? That is a question of great importance, and I would not like to dispose of it without a consultation of the whole Court. But there is a third point which, as it appears to me, will lead us to the solution of the difficulty in this particular petition, without the necessity of deciding these other points. If the reading of the statute be, that the Court may in its discretion, on being satisfied of the propriety of the proposed application, direct such funds to be laid out in payment of that fourth which is not contemplated by the Montgomery Act, then I think it becomes the Court to consider well and deliberately, whether, in the exercise of that discretion, this money should be authorised to be so applied, while there remain other debts which are burdens on the estate and on the succeeding heirs, whose interest we are bound to look to in the application of this money. Therefore it appears to me that it would not be a sound exercise of our discretion to allow this consigned money to be applied in payment of the fourth not covered by the Montgomery Act, while there remain three-fourths forming a burden on the heirs of entail, and ex-

Petition, Sir
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June 24. 1853. **Petition, Sir J. Richardson.** exceeding the amount of this fund ; and therefore I think it ought to be applied, in the first instance, to the extinction of those debts to which the Montgomery Act applies. I confess I do not feel the difficulty, expressed by the reporter, because the remaining fourth is not a claim under the Montgomery Act. The only claim under that Act is the three-fourths, and therefore, in discharging a claim under the Montgomery Act, nothing is done to sanction or reject the claim with regard to the remaining fourth. That, in truth, is a claim in spite of the Montgomery Act, and therefore to discharge a claim under that Act would not prejudice the right of Sir J. S. Richardson to come forward, if new funds should emerge and come into his possession, and present a fresh application to the Court to have such funds applied to the remaining fourth. But, in the meantime, it would not be a sound exercise of that discretion which has been committed to us by statute, so to apply this consigned money, while we see that there are other burdens to which it may be more advantageously applied—burdens affecting the estate and the heirs who may succeed to it.

LORD FULLERTON. I am sensible of the difficulties started by your Lordship, but I am disposed to take a simpler view of the claim of the party. If the question comes to be, whether these sums of money, particularly that of permanent improvements, are sums of money which the heir is entitled to demand repayment of? I have great doubt whether the Court has any discretion in the matter. Do the words of the statute mean that we shall object to the proposed application of the money? The Court no doubt must be satisfied as to the propriety of the application. But suppose they are quite satisfied that that expenditure is what the heir is entitled to be relieved of, are they to be entitled to go farther and say there are various kinds of expenditure, some of which are preferable to others, and so choose to which of them the consigned money shall be applied? I think that would be a singular kind of discretion, and I doubt the propriety of sanctioning it. I doubt whether the heir of entail in making his application was entitled to state anything more than that certain sums were expended in permanently improving the estate; and if that be so, then if we are satisfied that the expenditure is what the heir of entail is entitled to be relieved of under this statute, we are not entitled to say, there are certain other burdens affecting the estate and the substitute heirs, to the extinction of which this consigned money would have been more beneficially applied.

LORD IVORY. I have already taken occasion to state to the Court what is the view of the construction of this clause of the statute in my mind; but after the reference to other cases in which a different construction has been taken by the Court, I do not feel myself entitled with the same confidence to press these considerations. At same time, in none of these cases, it is most material to observe, was there any opposition. It is not, on the other hand, right to say that the Court would not have pronounced such decisions without applying their minds to discover what the legislature really intended. I am very grateful for the suggestion made by your Lordship in the chair, which I think saves, or at least, postpones the decision of some very large and important points, not that I am blind to the importance of the considerations thrown out by Lord Fullerton. Prior to this statute, this party was entitled to make

improvements and apply money arising in the way in which the consigned fund does, to the reimbursement of such expenditure. At the date when the present Entail Amendment Act was passed, the entailed estate and all its heirs-substitutes were free from any burdens in respect of previous improvements. Is there any thing in this statute which imposes such a burden on them which would not otherwise arise? Now, according to the construction contended for of this section, it comes to this, that when no improvements have, in the memory of man, been laid out on the estate, although benefit to the estate has disappeared, the mere fact of the disbursement having been made shall be enough to burden the estate. I cannot read the statute as meaning this, nor as applying to matters which never before had been held to be improvements with a view to reimbursement: therefore, *a fortiori*, I am inclined to agree with your Lordship in the proposition you have now suggested. I am for applying this money in the first instance to the extinction of those improvements made and constituted under the Montgomery Act, and which are burdens on the estate,—not excluding the party from coming forward if other funds shall arise, but leaving the rights of all parties entire with regard to that matter.

LORD ROBERTSON. I do not hold the case of *Richardson* nor the case of *Arniston*, which appear so to determine the point, as binding on the Court, for they were never seriously debated. I am not prepared to say that Sir J. S. Richardson, if there should be a large enough sum afterwards emerging, would not be entitled to have the whole sum applied to the extinction of the whole debt. On that I am not prepared to give any opinion; but as the course suggested by your Lordship leaves this point open, I think it is a very proper one. I think that the statute does confer upon us a discretionary power, and that, in itself, it is a very rational discretion which is so conferred. The debt which is to be paid is to relieve not merely the heir in possession, but the estate in all time coming. Not looking upon the matter as already adjudicated on, I think the course proposed relieves us of all difficulty.

The Court “Find that the consigned sum of £4,665 may be applied in payment, *pro tanto*, of the sum of £6,321 : 16 : 3, being three-fourths of the sum of £8,428 : 18 : 8, mentioned in the petition, . . . which sum of £6,321 : 16 : 3, forms a claim under the statute, 10 Geo. III., c. 51, the petitioner executing and recording in the Books of Session a discharge of that claim so far as extinguished by said payment: Farther, remit to the Lord Ordinary to see the said discharge prepared, to proceed farther in the cause as shall be just, and to report.”

J. & J. Anderson, W.S., Petitioner's Agents.

(J. S. M.)

PETITION, PATRICK M'DOUGALL.

No. 230.

Judicial Factor—Special Powers—Compromise.—Powers granted in respect of special circumstances to a judicial factor on the estate of a deceased party, to enter into a beneficial compromise of an action in which the factor, as representing the deceased, was pursuer. 1st Division.

This was a petition for special powers presented by the judicial factor on the executry-estate of the deceased Lieutenant Duncan Campbell. It set forth that the petitioner having found caution gave up an inventory or rental of M'Dougall. June 24. 1853. Petition, Sir J. Richardson.

June 24. 1858. ^{Petition, M'Dougall.} the estate falling under his appointment, which, *inter alia*, consisted of the right and interest, to the extent of *two-thirds* thereof, in an action of count and reckoning directed against the trustees of the late Major Campbell of Bragleen, Lieutenant Campbell's brother, at the instance of Mr James Wright, as *curator bonis* of the said Lieutenant Campbell. This action was raised in 1833, and a record was made up, but since 1835 no step appeared to have been taken in it. Lieutenant Campbell died in 1836. He was survived by three sisters, who were entitled to share his executry in equal proportions. Two of his sisters were dead. They left children, who would be entitled to claim the portions of Lieutenant Campbell's executry funds, to which their mothers had right, but they had not done so. In 1843 Mrs Geils Mary Campbell, his sole surviving sister, and her husband, were appointed executors dative, *qua* nearest of kin to Lieutenant Campbell. The executors realised the estate of the deceased, and paid to themselves the portion thereof to which they had right, as one of his three next of kin. They also transacted with the defenders in the action of count and reckoning referred to; and in consideration of the sum of £50, they discharged the same to the extent of one-third thereof, being their *individual* interest therein as such next of kin. Mrs Geils Mary Campbell having received payment of the portion of Lieutenant Campbell's executry to which she was entitled as one of the next of kin, and having also discharged her right and interest in the said action, the representatives of the other two sisters had right to the estate falling under the petitioner's management, consisting of the balance of the said executry funds, and the right and interest in the said action to the extent of the other two-thirds thereof. The petitioner, as representing the pursuer of the said action, had recently received a communication from the agent of Miss Campbell of Bragleen, who represented the defenders therein, which had led to an offer on the part of the defenders to pay the petitioner the sum of £100, for a compromise of the right and interest in said action to the extent of two-thirds thereof falling under his appointment. Several of the parties who were entitled to the beneficial interest in the estate were, the petitioner had been informed, in America, or elsewhere abroad, and the addresses of all of these parties were unknown to him, and he was unable to obtain their consent to or concurrence in the said compromise. That the petitioner was satisfied that the proposed compromise was highly beneficial to the interest of the parties for whom he acted. That the whole funds at the disposal of the petitioner for carrying on the action amounted to about £100. That the case was one of difficulty and perplexity, and there would necessarily be a very long investigation, involving a remit to an accountant, before it could be brought to a conclusion. In the event of the proposed compromise not being gone into, the whole funds of the estate would be expended in the prosecution of the litigation long before the final disposal of the cause.

In these circumstances this application was made for special powers to enable the factor to enter into this beneficial compromise.

The case was reported by Lord Deas.

Wood appeared in support of the petition.

The LORD PRESIDENT. I think that this is one of those cases in which a

factor is placed in a situation of difficulty, and is fairly entitled to come to the June 24. 1853. Court for a special protection. I am disposed to grant it.

The rest of the Judges concurred, and the powers prayed for were granted. ^{Petition,} M'Dougall.

Patrick M'Dougall, W.S., Agent.

(J. S. M.)

NISBETT v. DIXON.

No. 231.

Process—Counsel's fees.

In this case the Court allowed fees to three counsel for the pursuer, who 1st Division. was also the successful party in a jury trial, the defender having also em- June 24. 1853. ployed three counsel, and Lord Robertson, before whom the trial took place, Nisbett v. Dixon. being of opinion that the case was one in which three counsel were properly employed.

Macfarlane, was for the pursuer.

Mure, and *Neaves*, for the defender.

Hay and Pringle, W.S., Agents for the Pursuer.

Walker and Melville, W.S., Agents for the Defender. (J. S. M.)

MILLER v. URE.

No. 232.

Expenses—Accountant's fee—Agent and Client.—Circumstances in which the Court allowed the defender in an accounting the fees of a professional accountant employed by him to examine the books of a mercantile house, in which he and the pursuer had been partners, in order to enable him to maintain his defence.

Miller and Ure were partners as merchants in Glasgow. They had branch 2d Division. houses in the West Indies and elsewhere abroad, with resident managing June 25. 1853. partners. After the dissolution of the partnership, and the death of some or all of the resident partners of the foreign branches, Ure made a claim on Miller v. Ure. Miller for certain sums and shares of profits said to be due to him. These claims were ultimately settled by arbitration. Ten years thereafter Ure urged a claim of very large amount as still due to him on the transactions of the various houses, and raised multiplepoining in name of Miller, who objected that he had no funds in his hands belonging to Ure, and that the action was barred by the award in the previous submission, which was of all their mutual claims in reference to the partnership transactions. Ure denied that the submission included all his claims, and alleged that on examination of the books it would be found that Miller was still indebted to him. Miller being now an elderly man, and the firms having been dissolved for many years, he employed professional accountants to examine the company books (which were very numerous), in order to obtain information therefrom for the conducting of his defence. The Lord Ordinary, after remitting to Mr Moncreiff, accountant, to give in a report of the state of accounts, which was lodged in 1848, dismissed the action with expenses, on the ground that the submission included all claims competent to Ure; and the Inner House adhered to this interlocutor with additional expenses. In his accounts thereof Miller claimed £211, 12s., being the fees he had paid to the accountants employed by him. This sum the auditor disallowed. As regarded this point, *T. M'Kenzie*, for Miller, now objected to the auditor's report.

June 25. 1853. *Penney, contra.* This is just a demand to be allowed the charge of an additional agent in the case. Miller did not require such aid in examining his own books.

The COURT considered that, in the special circumstances of this case, the party was evidently entitled to take the aid of an accountant; and, therefore, sustained the objection, and allowed the accountant's fees, (but only up to the date of Mr Moncreiff's report,) amounting to £115.

W., A. G., & R. Ellis, W.S., Pursuer's Agents.
Campbell & Smith, S.S.C., Defender's Agents.

(J. M. M.)

No. 233.

MARTIN v. KELSO, &c.

Clause—Construction—Entail—Alteration of Order of Succession—Faculty—Heir-female.
—A deed of entail provided, that so oft as the succession should devolve upon females, the eldest "heir-female" should exclude the other heirs-portioners; but that it should be in the power of the heir in possession "so often as his apparent or presumptive heirs are females so far to alter the destination of the succession as to settle the estate upon a younger daughter in preference to an elder."—*Held*, that an heir in possession, though he had never any daughters of his own, his heirs-presumptive being his sisters, could exercise this power of alteration by preferring a younger sister to the elder. *Question*, as to meaning of term "heir-female" in the law of Scotland.

2d Division.

June 28. 1853.

Martin v.
Kelso.

In 1764 Mary M'Gill or Kelso and Jean Kelso conveyed, by strict entail, their estate of Dankeith to Mary M'Gill or Kelso herself, and her assignees; whom failing, to Captain John Kelso, and to the heirs whatsoever of his body; whom failing, to certain other parties; it being declared, that "the eldest heir-female and the descendants of her body, so oft as the succession shall devolve upon females or their descendants" should exclude "all other heirs-portioners, and succeed always without division throughout the whole course of succession." The prohibition against altering the order of succession was made subject to the following exception:—"That it shall be lawful to the said Captain John Kelso and the other descendants of his body, so often as their apparent or presumptive heirs are females, so far to alter the destination of succession above written as to settle the estate upon a younger daughter in preference to an elder daughter, or to pass by such daughters altogether, and to settle the estate upon the presumptive heir-male descended of the body of the said Captain John Kelso." A feudal title was completed in terms of this entail. The heir in possession in 1837 was Colonel William Kelso, a descendant of the body of Captain John. He never was married, and his presumptive heirs were his four sisters, Elizabeth Kelso or Martin, the eldest and mother of the pursuer, Margaret, Mary-Susannah, and Eleanora Kelso. In 1837 he executed a settlement, proceeding upon the power of alteration competent to the descendants of Captain John's body by the entail of Dankeith, and called to the succession, failing heirs of his own body, his youngest sister, Eleanora, the defender, and the heirs whatsoever of her body. On his death in 1844 she entered into possession. This action of reduction was now brought of, *inter alia*, the deed of 1837, on the ground that the power of alteration could only be competently exercised by an heir of entail who had daughters; that it was therefore *ultra vires* of Colonel Kelso to prefer one of his sisters over another; and that the pursuer, by the death of his mother,

was now the heir entitled to possess Dankeith under the entail. The defender's first plea in law was, that according to the sound construction of the entail, Colonel Kelso, as a descendant of Captain John's body having females as his presumptive heirs, was entitled to settle Dankeith in terms of the destination in the deed of 1837. June 28. 1853.
Martin v. Kelso.

Great avizandum was made with the case.

N. Campbell, and *Dean of Faculty*, for pursuer. A faculty or power must be strictly construed, which creates an exception to a clearly expressed clause of destination,—a clause which always receives liberal interpretation. We must follow the very words of the power; and it only gives power to prefer in the case of daughters of the exerciser. Such being its plain terms, no collateral evidence, though derived from other clauses in the same deed, can be permitted to control them; *Dickson v. Dickson*, 4th July 1851.

Mure, and *Neaves*, for defenders. The rule applicable to the construction of all destinations comes into operation here, viz., that the intention of the party is to be gathered from his deed. The clause in dispute speaks of *a* (not of *his*) younger daughter; there is thus room for construction, and the whole tenor of the deed shews that the power may be exercised whenever the heirs presumptive are females,—(LORD JUSTICE-CLERK. The term presumptive or apparent heir-female, is, in the law of Scotland, generally, if not always, applicable to a daughter, never, I think, to a sister.)—and not merely where the heir in possession has daughters.

LORD COCKBURN. I am of opinion that the pursuer's plea ought to be repelled. I think so for these reasons:—In the first place, the case for which the entailor meant to provide, was that of the apparent or presumptive heirs being females—not being daughters of the person exercising the permission of changing the order of succession, but females. This being the declared object of the clause, the subsequent provision must, if possible, be construed in such a way as to promote the attainment of the object, and not so as to defeat it. But the pursuer's construction, which allows the power to be exercised only towards daughters of the person exercising it, does appear to restrict the power far within the entailor's avowed object. If he had intended to make it applicable solely to daughters of the existing heir, I cannot conceive how he came to speak of all apparent or presumptive heirs whatever. The pursuer's plea implies that in no case could anybody but daughters be selected from, or passed over. No bachelor, according to this, can exercise the power; and though a father may exclude his daughters, he has no such power over his sisters or nieces. These appear very odd results, and most improbable ones for the entailor to have contemplated. Something was said in argument about the expression *heirs apparent or presumptive* meaning, in the law of Scotland, only children, or some definite class of heirs. I do not admit this either in our legal, or in our ordinary language. I never heard before that a man's sister or niece could not be his apparent or presumptive heir. In the second place, in extending the power beyond the case of the daughters of the heir exercising it, we are within the very words of the power. The deed says that the party may settle the estate "upon a younger daughter;"—a daughter, not a daughter of his own; but *a* daughter. I cannot convert *a* into *his*; so

June 28. 1853. *Martin v. Kelso.* that it just means an heir female;—the daughter of anybody within the destination. That this is the true meaning is proved, in the third place, by the rule that is given in an adjoining clause as to the exercise of the power by a married heiress of entail. It is, that she may exercise it without the consent of her husband. “It shall be competent to her to make the aforesaid alteration excluding the persons incapable,” (by forfeiture, &c.,) “or heirs female aforesaid” without his consent. What heirs are these? Just the persons previously spoken of as daughters. It is a declaration, or at least an unavoidable implication, that by daughters are meant, not merely the daughters of the party availing himself, or herself, of the power, but all heirs female. I hold the pursuer’s construction, therefore, to be inadmissible.

LORD MURRAY. It is no doubt possible to construe this clause, so as that a younger daughter in preference to an elder daughter, shall not be held to mean a younger or an elder daughter of Captain John Kelso, and the other descendants of his body, but a sister, an aunt, or a cousin. But that is not the plain and obvious construction of the terms used, but somewhat forced. The clause provides that it shall come to use so often as the apparent or presumptive heirs are females. I doubt whether the term *apparent or presumptive heir* can apply to any female but an immediate daughter. The alteration allowed is to settle the estate on a younger daughter in preference to an elder. If the question is put, whose daughters are they who are to be preferred or postponed? the obvious answer seems to be, the daughter of the person making the settlement. It is a very extraordinary power. It is a deviation from the line of descent established by the entail, which must be considered as the leading object of the deed. Such deviation ought not therefore to be extended, but on the contrary strictly construed. I hold that the succession could not be altered, unless where the daughters of the person making the alteration were the persons to be affected by it.

LORD WOOD. I cannot adopt the pursuer’s view of the clause conferring the power. If the *latter* part of that clause were expressed in words which had a definite and positive meaning, it may be that that meaning is not to be disregarded, and that the prior and introductory portion ought to have no influence in fixing the extent of the power conferred. But I apprehend, that in judging whether the meaning of the *latter* portion is clear and unambiguous, and not admitting of construction, or whether on the contrary, it is doubtful, and fairly admitting of construction, the whole clause is to be looked to, and that, if the latter portion of it appears doubtful, the import and extent of the power may be legitimately determined by a reasonable construction of the clause in all its parts, and according to the testator’s intention as thence, which is from the words used, fairly and legally and not conjecturally deduced or inferred. Now, the occasion on which the power of altering the order of succession is given to Captain John Kelso and the descendants of his body is set out in express terms to be “so often as their apparent or presumptive heirs are females.” The privileged heirs are then to have the right to exercise the power, to which these words are introductory, of altering the order of succession. Certainly in this part of the context there is no indication that it was only when the apparent or presumptive heirs-female stood in a particular relationship to the heir in possession that the power was to apply. If so

limited a power had been contemplated, I cannot think such introductory words would have been used. They point at the very reverse, and are appropriate to it. But it may be that, by what follows, the power has been defined in such clear and unequivocal words, that they can receive no other meaning than that attached to them by the pursuer. But this, as it strikes me, is not the state of the case. It is true that the word *daughters* is used as designative of the parties among whom, or to the entire exclusion of whom, the power of preference and of altering the destination may be exercised. But I do not see why, on this account, and having regard to the connection in which the term *daughters* is employed, that power can only be competently exercised when the apparent or presumptive heirs are the daughters of the party exercising it. There is nothing in the term *daughters*, as used, which necessarily imports that they shall be daughters of the heir by whom the power is to be exercised. It has no such inflexible meaning. It may also without any straining of construction mean daughters of other parties, and thus leave this power to be exercised by the privileged heir, if his apparent or presumptive heirs are females, though they may not be his own daughters. The clause does not say that Captain John and the descendants of his body may so far alter the destination as to settle the estate upon his or their younger daughters in preference to an elder daughter. What is said is, they may so far alter the succession as to settle the estate on a younger daughter in preference to an elder—a form of expression which, instead of fixing the meaning of the word daughters to be daughters of the heir exercising the power, and thereby confining it to heirs having daughters, appears to shew that it has a much wider range, and enables the power to be exercised in consistency with the introductory part of the clause. I would farther remark, that if the words in the latter part of the clause are not absolute in their meaning, then, but then only, it does not seem to me to be irrelevant or immaterial in considering and endeavouring to ascertain what the meaning is—that it cannot be disputed that by the exercise of the power the succession of females other than the daughters of the heir using the power, may be affected; for it is undoubted, that the privileged heir, if he has daughters, and choose to pass them all over, is at liberty to pass over all the other heirs-female in the destination, and to settle the estate on the presumptive heirs-male of the body of Captain John Kelso. This would seem to confirm the defender's construction. Upon these grounds my opinion (but I cannot say my confident opinion) is, that William Kelso's deed in 1837 was a valid exercise of the power.

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LORD JUSTICE-CLERK. I have seldom been under greater difficulty. I concur generally with Lord Murray; and yet it is possible that heirs-female may denote parties not being daughters of the heir exercising the power. Were I sitting alone, I would hold that that term could only mean the daughters of such heir. But as the other is a possible construction, I cannot get rid of a feeling that I could not wish the lady to lose the estate owing to a difficulty started by myself, but not participated in by two of your Lordships. I do not differ in result, but I withhold the concurrence of satisfaction with the judgment about to be pronounced.

The COURT "Sustain the first plea in law for the defender."

John Martin, W.S., Pursuer's Agent.

Hunter, Blair, & Cowan, W.S., Defender's Agents.

(J. M. M.)

No. 234.

NORTH BRITISH BANK v. AYRSHIRE IRON COMPANY.

Bill of Exchange—Obligation—In rem versam.—Circumstances in which the general rule of law was applied, that a party who discounts a bill and receives the proceeds does not become liable to the discounter unless his name appears *ex facie* of the bill—*Observed*, that to impose such liability a very clear and special case must be made out.

1st Division. This was an action at the instance of the North British Bank against the June 29. 1853. Ayrshire Iron Company, and Alexander Alison, and John Hamilton, and others, partners thereof, for payment of £5000, due on a bill for which it was alleged the iron company was liable. The bill was dated 31st August 1847. It was drawn at four months by Alison upon, and accepted by Hamilton, payable at Jones, Loyd, & Co. London.

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v. Ayrshire
Iron Co.

Prior to February 1847, a company carried on business in Glasgow and Ayrshire, under the name of the Blair Iron Company. Of this company Alison purchased half the stock, and became sole manager. Hamilton purchased certain shares in it from Alison, and granted bills for the price. In February 1847 a new company was established under the name of the Ayrshire Iron Company. It consisted of numerous shareholders, and was managed by five directors. Both Alison and Hamilton were directors, and Alison was also manager. The bill in question was one of a series of £5000 bills granted by Hamilton to Alison, in reference to their private transactions prior to February 1847. It was drawn by Alison, and accepted by Hamilton, as individuals. In these circumstances it was taken by Alison to the pursuers, the North British Bank, to be discounted. The names of the defenders, the Ayrshire Iron Company, were not upon it in any form. The pursuers discounted it, giving the amount in the shape of an order for £4790:11:1 in favour of the Ayrshire Iron Company, upon the Union Bank of London. Alison was at this time largely indebted to the Ayrshire Iron Company; and one of the series of £5000 bills had been previously handed over by him in June to the company, to account of the debt due by him to them. This order on the Union Bank was indorsed by Alison and Hamilton, as directors of the Ayrshire Iron Company. It was discounted by the Western Bank of Scotland on 1st September, and the proceeds, minus £46:9:4 of discount, were admittedly paid to the Ayrshire Iron Company. In the company's books, Alison was of date 30th June credited with the full amount of the bill for £5000, and of date 1st September, an entry bears, "To bills receivable. For J. Hamilton's bill, £5000." Alison was sequestrated in December 1847. Hamilton became bankrupt about the same period. The Ayrshire Iron Company sustained very heavy losses, and was dissolved in May 1848. The bill was not retired when it fell due on 3d January 1848; and the pursuers now contended that the parties subscribing the bill not having retired it, the defenders, the iron company, were liable for the amount. In defence, the iron company pleaded non-liability, on the ground that they were not parties to the bill: That the draft taken payable to their order was received by them in payment of a debt due to them by Alison, and could not found a claim against them.

The Lord Ordinary (Wood), "assoilzies the defenders," with expenses.

The pursuers reclaimed, for whom—

Penney, and the *Deas of Faculty*. The question is, was this bill discounted by or on behalf of the defenders? That it was so is evident from the books of the defenders themselves. On 1st September Alison is credited in the ledger of the Ayrshire Iron Company with the full amount of the bill; but in order to get possession of the draft on London, the company had to pay £46:9:4 of discount—and again that draft was for £4790:11:1 only—being minus £209:8:11 of discount on the original amount of £5000 with which Alison is credited. In this way the company truly paid £255:18:3 of discount on the whole transaction. The books kept by the defenders are good evidence against them; and the bill being entered on the debit side of these books, and the defenders having paid the discount which brought the bill into their possession, it cannot be maintained by them that the bill was not their property; and therefore they are liable for the amount of the bill as concluded for; *British Linen Co. v. Thomson*, 27th Jan. 1853.

T. Mackenzie, and *Neaves*, for the respondents. The bill is entered in the books of the company on 1st September; but by that time it had been indorsed away to the North British Bank. It was presented by Alison as an individual, and discounted on the faith of the names which appeared on it. The bank were in truth purchasers of the bill, and cannot now have recourse against the Ayrshire Iron Company, who, *ex facie* of the bill, have no connection with it, and that even upon the assumption that at the date of the discount the bill was their property, and that the proceeds were received and applied by them; *Thomson on Bills*, p. 279; *Bayley on Bills*, sixth edition, p. 374; *Bank of England v. Newman*, 3d May 1699, *Raymond's Reports*, p. 422; *Fyde v. Clark*, 27th Feb. 1796, 1 *Espinasse's Reports*, p. 446; *Kirby v. Todd*, 27th Nov. 1819, 1 *Buck's Reports*, p. 515; *Ernly v. Lye*, 1812, 15 East. 6; *Wood & Co. v. Telford*, House of Lords, 26th May 1824, 2 S. Ap. Cases, p. 219.

The LORD PRESIDENT. The names of the parties by whom the bill is made and indorsed do not appear *ex facie* of the bill in any official capacity, or so as to bind the Ayrshire Iron Company by force of the bill itself. The liability of the defenders therefore must be deduced from something other than the obligation undertaken by the bill. There may be such an obligation; but, where a claim is made by a banker who has discounted a bill upon a party whose name does not appear on it, he must make out a very special and clear case before he can impose liability on such a party; and the question here is, whether the circumstances stated are such as to make out that claim satisfactorily? What are the circumstances here? The pursuers say this bill was the property of the defenders, because discounted by them, and for their behoof and benefit—that the proceeds were applied to their purposes—and that on these grounds the claim is raised. Now, some of these elements are scarcely made out as existing in this case. I do not know what the pursuers mean exactly by saying that the bill was “discounted by.” That is put in a sort of alternative way in their plea in law, as being for the benefit of the defenders and on their cognizance. Then it is said that an order on London in their favour was obtained. But Alison discounted the bill for his own behoof, and he being a debtor of the Ayrshire Iron Company, gets an

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order on London in favour of the Ayrshire Iron Company—thus getting an order in the way in which he chooses to pay his own debt—that is, just handing the money to them in the way he likes best. The view I take of the case is this, that the pursuers discounted this bill in the course of business, and it does not appear and is not alleged that they discounted this bill on the faith of anything but what is on the face of the bill. Now, what is on the bill is the names of Alison and Hamilton as individuals, not as partners of the firm. In this way I am inclined to regard the discount as substantially the purchaser of the bill. I do not think the presumption is that a party who gives in a bill without his name remains liable for it. It is the other way, and it would require a very strong case to fix the liability on him. That he got the money is of no consequence. The presumption is that he got the money for his own use—that he gave the bill to the bank as a matter of purchase by them in reference to what appears on the bill. Therefore, looking at it in this way, that the proper mode of binding the party to such a bill as this is to have his name on the bill, and that when that is not taken, the presumption is that he was not bound, but that the other parties whose names are on the bill are bound by it; in that view, I do not think that the circumstances founded on here overcome the presumption and impose any liability at all. The only case that has been cited against this one is the case of the *British Linen Company*. I do not think that case takes it out of the rule, nor that the circumstances are sufficient to take this case out of the principle that the parties' names should be on the bill, and, if not, that it is not to be implied that liability attaches.

LORD IVORY. I concur. The very simple ground on which I go, is, that so far as the defenders are concerned, they have, *ex facie* of the bill, no connection with it at all. The drawer and indorser both appear on the bill in their individual character; and I see nothing extraneous to the bill which brings the company in contact with the bank at all. There is no transaction or contract to bind them; and on these two grounds, I think there is no action on the bill or on contract.

LORD FULLERTON. I think the case is attended with some difficulty; at the same time, I am not prepared to dissent from the opinions expressed. But I think the case is one of the narrowest. The bill arose out of a private transaction no doubt; but Alison's purpose in going to the bank with the bill evidently was to get money for the Ayrshire Iron Company. He was the manager of the company, and if Alison's name had been on it as manager it would have been quite clear. He got the money for behoof of the company in a way which shewed that the bill was the property of the company. It is coming as near to that as can well be conceived, but I cannot say that it is quite conclusive. I think there is a distinction between this case and the *British Linen Company's* case, but it is not free from difficulty.

LORD ROBERTSON. I think the interlocutor of the Lord Ordinary well founded. Plainly in form, Alison and Hamilton stand on this bill as drawer and acceptor in their individual capacity only, and in the same capacity Alison indorses it. The question is, whether the receipt of the proceeds of the bill can make them liable as parties to that bill? There can be no doubt of the general rule that the mere destination of the money obtained on discounting a bill, or

the receipt of that money, does not make the party receiving it liable to the dis- June 29. 1853.
 counter, and that in such case action can only lie against the parties appear- N. Brit. Bank
 ing on the face of the instrument. There may be exceptions to this rule in v. Ayrshire
 extreme cases—such as that of *Murray and McGregor v. Campbell*, 6 Shaw, Iron Co.
 p. 147, and the more recent case of the *British Linen Co. v. Alexander*, 14th
 January 1853. The present case, however, is by no means the same with
 either of these. It falls, I humbly think, under the general principle, of which
 so strong an example was given in the reversal of the judgment of this Court
 in the case of *Hood v. Telford*, 26th May 1824, Shaw's Rep., v. 1, p. 219.
 It was the duty of the bank, if they intended to hold as liable both the com-
 pany, in whose favour they granted the order on London, and the individuals,
 on the faith of whose names they gave that order, to have put the transaction
 in a form to insure that liability. But they have not done so, and in such a
 case as the present I see no ground for going out of the ordinary and salutary
 rule, or for holding that the parties by whom the instrument was made were
 not the true and sole parties to that instrument.

The COURT "adhere," with additional expenses.

Alexander Hamilton, W.S., Pursuers' Agent.

Gibson-Craig, Dalziel, & Brodie, W.S., Defenders' Agents. (J. S. M.)

BARONESS SEMPILL v. ALISON, &c., (AUSTIN'S TRUSTEES),
 AND O'REILLY.

No. 235.

Trust-Disposition and Relative Instructions—Construction—Substitution—Fee and Liferent—Succession.—A testatrix conveyed her whole estates to trustees, to make over, or to hold and apply, the residue thereof in terms of any letters of instructions she might leave. By one letter of instructions, she directed them to pay and make over the residue to A., and his heirs and assignees; and constituted A. her residuary legatee. By a posterior letter, on the narrative that the said A. had no longer any prospect of children, she "deponed and bequeathed" B. to be "the successor" of the said A. in the said residue:—*Held*, that under these writings, A. was constituted unlimited fiar of the residue, having full power of disposal, but with a simple substitution in favour of B., in the event of that power of disposal not being exercised. Trustees, accordingly, ordained to make over the residue to "A. and his assignees; whom failing, to B. and his heirs and assignees."

Miss Collins Austin died on 13th June 1852, leaving trust-disposition and 2d Division.
 settlement, dated 5th April 1845, whereby she conveyed her whole property, June 30. 1853.
 heritable and moveable, to the defenders in trust, for the purpose that, after
 paying her debts and legacies, they "shall make over or convey the free Sempill v.
 residue and remainder of my estate and effects, to and in favour of such per- Alison, &c.
 son or persons, or shall hold, apply, and employ the same to and for such uses
 and purposes as I have directed and appointed, or shall hereafter direct and
 appoint by any writing under my hand, at whatever time the same may be
 executed by me, *etiamsi in articulo mortis*; which shall be valid and effectual,
 if written and signed by me as aforesaid, though deficient in the usual legal
 formalities." The truster left several papers of directions for her trustees:
 Of these the earliest, dated in September 1840, bore, "I direct and appoint
 my trustees and executors . . . to pay and make over the whole residue
 of my estate and effects, heritable and moveable, after deduction of my debts,
 legacies, and anveties, &c., to my dear cousin, the Right Honourable Lady

June 30. 1858. *Sempill, and her heirs, and assenees, who I hereby appoint to be my sole residuary legatee; and preserve full power to myself to alter or revoke these legacies and anuities, in whole or in part, at any time of my life, and even on deathbed.*" The second writing was as follows:—*Bellwood, 22d of July 1841 years*:—Codicil to my last will or settlement. As there is no prospect now of my dear cousin, the Right Honble Lady Sempill, having a child, I depone and bequeath as her successor, my grandniece Collins S. O'Reilly, youngest daughter of the late William P. O'Reilly, surgeon in the 56th, and other regiments, to succeed the said Right Hon. Lady Sempill in all my landed property, plate, furniture, &c. Always to be understood, with the burden of all my anuities, also legacies, if not already paid, and debts I may be due." In May 1846, Miss Austin executed a third writing—titled "Second Codicil"—as follows:—"I, in virtue of the foresaid reserved powers in my trust-deed, do hereby recall or revoke from the Right Honble Baroness Sempill, that part of my landed property, my house in Edinburgh, situated in 15 Manor Place, with all the furniture, bed and table linen, and one half of my silver plate; and I do hereby bequeath the same property to my grandniece, Collins S. O'Reilly, always to be understood with the bed and table linen, and one-half of my silver plate."

In the present case, the construction of these various deeds came before the Court. It was an action at the instance of Baroness Sempill against Miss C. Austin's trustees, and it also called Miss Collins S. O'Reilly as a defender. It concluded—1. To have it declared that the pursuer, under the above deeds, "has a good and undoubted right of fee and property in the whole residue of the estate and effects, heritable and moveable, of the deceased Miss Austin," with exception of the house in Manor Place, and furniture, &c.; and "has good and undoubted right to dispoise, convey, and dispose of the said whole residue, as she may think proper, either onerously or gratuitously." 2. That the trustees should hold count and reckoning for the said residue, and denude thereof, and "pay, and make over the same to the pursuer, or her assignees, whom failing, to and in favour of the defender, the said Miss Collins S. O'Reilly, and her heirs and assignees;" and grant all necessary deeds and conveyances, &c., &c.

These conclusions were resisted both by the trustees and by Miss O'Reilly, both parties maintaining the same line of defence, That, according to the sound construction of Miss Austin's settlements, the trustees were bound and entitled to hold the residue for behoof of the pursuer, and of Miss O'Reilly successively, and so as Miss O'Reilly's right of succession, in the event of her surviving Lady Sempill, might be secured against all her ladyship's acts and deeds, whether onerous or gratuitous.

The Lord Ordinary (Rutherford), "Repels the defences for all the defenders, and finds, decerns, and declares in terms of the conclusions of the libel; Finds the defenders severally liable in expenses: Finds that the defenders, the trustees, are not entitled to charge against the residue of the estate,* either

* His Lordship refused to allow the trustees to charge their expenses against the trust-estate, on the ground that they had made up a separate record, instead of adopting that of Miss O'Reilly, who maintained in substance the same pleas, and founded upon the same facts with them.

the expenses incurred by them in the action, or the expenses in which they June 30. 1853. are found liable," &c.

Both parties reclaimed.

Sempill v.
Alison, &c.

Mark Napier, was for the trustees; *E. Gordon*, and *Neaves*, for Miss O'Reilly.

H. Robertson, and *Dean of Faculty*, *contra*.

The LORD JUSTICE-CLERK was against the interlocutor. He observed :—

"The meaning and effect of the first paper of instructions of 1840 are indisputable. Lady Sempill was to take an absolute right of property in the whole residue of the estate, and failing her, by predecease before the testator, her heirs and assignees. If she survived the testator, the estate vested in her in fee-simple. But in about a year after, the lady makes another appointment—22d July 1841—in terms of her own selection, for which no form had been given to her, and expressing the purpose she had in view in her own language. It was made to meet the case of Lady Sempill having no children—a very important state of facts, in her opinion, with reference to the extent of the benefit which Lady Sempill should receive, and very important in reference to any other direction she might make as to the disposal of the residue. The first observation which strikes me as material is, that we are not here called on to balance between two clauses in the same deed, and to allot to each their appropriate meaning. In such a case, I have more than once stated my opinion to be, that if in the first clause there is, according to the legal meaning of the terms employed, a distinct benefit and right conferred on the primary beneficiary favoured, that right and interest is not to be limited by any after clause of disposal from implication, but only by the most express words, making of necessity the latter clause a condition of the former, and that the two clauses are to be so taken as to stand together for different states of the facts :—That is to say, that the second is to be taken in the general case as a clause of appointment and disposal to take effect on failure before the testator of the first party favoured, or on any other definite event stated in the deed. Thus the second clause takes full effect in the case provided for, without altering or affecting the interests conveyed by the first clause. But we have here two separate writings made at different periods, and the later one made in respect of a state of facts, which the testator thought had become certain since the date of the first. So there is here no room for the presumption, or rule of construction which I have just stated. The question arises on a distinct subsequent writing—a later direction of the testator's will, and in which alteration may naturally occur. Inconsistency between two clauses in the same deed we have not to consider. Now a change the testator intended to make by this late writing; that is beyond doubt. It was to be an alteration in the estate and interest given to the party favoured by the first writing. The respondent, Lady Sempill, avoided as much as possible any direct definition of the interest intended to be conveyed by the later writing to Miss O'Reilly. She admitted, however, that it applies to, and takes effect in the case of Lady Sempill's survivance, and was intended for that case; though, of course, if Lady Sempill had predeceased, it would *a fortiori* apply. Yet her plea directly and substantially denies all effect whatever to this later

June 30. 1853. *Sempill v. Alison, &c.* appointment. She pleads that she is *fiar*, just as absolutely as if this paper had not been executed. Such a construction I cannot reconcile with any view which can reasonably be taken of the purpose of this writing, or with a fair, plain, common-sense execution of the purpose which it is the duty of the Court to carry into effect. What is that declared purpose? It is rested on the belief in the mind of the testatrix, that Lady Sempill has no prospect now of having a child. That was a change in the state of facts very naturally affecting the view of the testatrix as to the extent of the right and interest to be given to Lady Sempill. Accordingly, she disposes and bequeaths Miss O'Reilly, as Lady Sempill's successor, "to succeed Lady Sempill." Well, then, is she not to succeed? "Yes, says Lady Sempill; but only if I choose to allow her." Now, I construe the testatrix's appointment to mean, not what Lady Sempill is willing to allow, but what the testatrix had the power to direct and did direct. And if, in a writing not restricted by the fixed meaning of any technical terms, she has directed, by an appointment to her trustees, that her grandniece is to succeed Lady Sempill, I hold that the Court is to secure that result, and not to leave it to the will of Lady Sempill. I hold that the direction, being the will and pleasure of the testatrix, *is to be carried into effect and secured*. Now, nothing is so easy, for the whole estate is given to trustees, *to apply and hold for the purposes she may appoint or has appointed*. When a truster, on the express statement that the party she meant at first to favour is not likely to have any children, declares in a subsequent direction to trustees that another relative is to succeed that first-named party, I cannot doubt that the latter direction is to be operative and effectual; for she has the power to direct, and the trustees the power and duty to fulfil that direction. The less technical, the more inartificial and simple the terms employed in a writing by the party himself, the less embarrassed is the Court in finding that the purpose of the testator must be fully secured and carried into effect; although the terms, if they had occurred in a formal deed, might not have been stringent enough to effectuate the testator's object. Various cases of this kind have occurred as to the mode of carrying into effect directions as to an entail given to trustees, the terms of which in themselves, in a formal deed of conveyance, would not have been sufficient to make a valid entail. The present is a declaration of the truster's intention, clearly obligatory on the trustees. In one way it will be effectually executed; in the other it will not, but will be defeated and rendered unavailing, and the pretence of executing it will be in truth a mocking of the testatrix. To that result I cannot bring my mind. If the term "*succeed*" occurred in a simple destination in a direct deed of conveyance, of course it would not restrain the right of the first donee. But there cannot be a greater error than to measure the effect to be given to a truster's directions to trustees, *who are to fulfil her will and appointment*, by the construction which might be put on a particular term if it occurred in a technical deed of direct conveyance to A., and to B. as the successor of A. To *succeed*, in such a testamentary writing or appointment to be executed and carried into effect by trustees, appears to me to be the broadest term a truster can use, in order to secure the object of the party so called taking after the party first named. It relates to what is *TO TAKE EFFECT at the death* of the party first named, not before. There is an appointment

on the trustees, that, in that result, Miss O'Reilly is to succeed to Lady Sempill on her death. Now, how is the party to succeed in execution of the trust? Is any effect really given to the appointment by the trustees, if they part with the funds and estate by a deed which will not be effectual on the death of A. unless A. chooses. That is a mode of executing a trust of which I know no example, unless the terms of destination are specifically given in the trust-deed as the mode chosen by the truster for carrying out his purpose, a case with which the argument of Lady Sempill confounds the present. It is on the death of Lady Sempill that Miss O'Reilly is to succeed. That is an appointment on the trustees as much as the first writing in favour of Lady Sempill. Then that result is to be executed by the trustees, and secured, else she will not succeed. The purpose is to be carried out by the trustees and the Court. It may be done. And when the alternative is, whether the testator's last direction is to be secured or defeated, I really cannot hesitate as to the conclusion."

LORD COCKBURN expressed a similar opinion, adding, "It is impossible for me to believe that the testatrix made her second writing merely in order to tell Miss O'Reilly, whom she undoubtedly meant to favour, that she might take whatever Lady Sempill might give her. This would have more of a joke or an insult in it than of a bequest. It was argued that the codicil of May 1846 shews, that when the testatrix intended to revoke, she did it by direct words. I see no force in this. She used direct words there, because she was recalling a disposition both of the fee and of the liferent of a house. Not meaning to revoke the liferent here, she left it, but declared that, after Lady Sempill, Miss O'Reilly should succeed; which I hold to be a virtual revocation of the fee. It was also argued, that Miss O'Reilly could not succeed to Lady Sempill if her ladyship was only a liferentrix, but that her succession would be to the testatrix. There is nothing in this hypercriticism. It rests on a formal and technical, instead of the obvious and practical, meaning of the word succeed. In this writing it only means to get the estate after her. On the whole, I cannot obliterate the second writing; which I think that the interlocutor under review does. I hold that the trustees are charged with the duty of protecting the interests of Miss O'Reilly, and that they are bound to do this by abstaining from giving the Lady Sempill the estate so absolutely as to enable her to defeat the arrangement which I think was made by the testatrix in Miss O'Reilly's favour."

LOEDS MURRAY and WOOD, on the other hand, were for adhering; the latter observed:—"In the codicil of 1841 I see an intention distinctly disclosed, that there being then no prospect of Lady Sempill having a child, the estate should not be left to stand without any farther declaration of the testator's wishes in regard to the succession than was contained in the codicil of 1840. By it Lady Sempill's heirs and assignees were to take; by the latter codicil Miss O'Reilly is to take. She is put in the place previously occupied by the heirs of Lady Sempill. But I do not see any thing in the terms in which this is done, which to my mind is sufficient to warrant the inference that Lady Sempill, who was originally the party most highly favoured by the testator, was to be deprived of the right of fee absolutely given to her by the codicil of 1840, and that if Miss O'Reilly was not placed wholly before Lady

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June 30. 1853. Sempill to her entire exclusion, by being named her successor, the fee was to be held for her, and that thus, if not first in time, she was to be prior and preferable in right. I think that what was done, while it included a conditional institution of Miss O'Reilly if Lady Sempill predeceased the testator, was to create or provide a substitution in her favour, if Lady Sempill survived the testator, that is, not abrogating or recalling (and confessedly there are no express words to that effect) the direction in the codicil of 1840, to pay and make over the estate to Lady Sempill; but requiring that it shall be made over with a destination or substitution in favour of Miss O'Reilly, as the party successor named to succeed Lady Sempill therein. I admit that, taking this to be the result, it will be in the power of Lady Sempill to defeat or evacuate the substitution or right of Miss O'Reilly, either onerously or gratuitously; but then, what I desiderate is, any ground for holding that the nomination of her as a successor to Lady Sempill, as made, was intended to secure the succession to Miss O'Reilly beyond the reach of disappointment. Being liable to be defeated, the benefit conferred is no doubt precarious, but still, according to the views of testators, that is considered a not unimportant benefit, and frequently has that issue in consequence of the party previously favoured, from respect to the declared wishes of the testator, not exercising the power purposely left to him. Accordingly, every day's experience shews that this is the whole amount of right which a testator, by such a disposal of his estate, means to establish; and, in my opinion, it was this description of right, and no higher, that the testator here intended Miss O'Reilly to have in virtue of the codicil of 1841. No doubt the nomination of Miss O'Reilly is contained in a separate writing. But in the question of the testator's meaning and intention in making the appointment, I cannot perceive how that fact should *per se* be of any value, or how, unless there were something to suggest it, either in the reason assigned for the appointment, or in the words employed,—the testator should on that account be held to have acted with a different object and motive from that which would have been attributed to her if the appointment had been made in one and the same deed, say, in the codicil of 1840. There is a total absence of any thing indicative of the testator having intended to confer upon Miss O'Reilly the absolute right of succession for which she contends. All I can gather from the alteration made upon her settlement in 1841 is, that she did what, if the circumstances had been the same—if there had then been the same inductive cause,—she would have done by the codicil of 1841. Reading the writings as they stand, I am of opinion that the direction, contained in the first writing of instructions, to make over the estate, heritable and moveable, to Lady Sempill, continued to be the ruling and regulating one.

The Court being thus equally divided, the case was heard again by the Court, with the addition of three Judges from the First Division, *Neaves* arguing for Miss O'Reilly, and the *Dean of Faculty* for Lady Sempill.

LORD FULLERTON. I concur with Lords Murray and Wood, adhering to the Lord Ordinary's interlocutor. I do not see here any necessity for going into the principles on which questions of doubtful interpretation are to be decided. I think there is no room for construction, for I see no ambiguity in the terms of these settlements. It is true we have here a double set of

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deeds—trust-deeds of conveyance and letters of instruction—which last certainly admit of an easier and less technical interpretation than proper deeds of conveyance. But still the deeds of instruction require to be clearly expressive of the *intention* of the testatrix; and I think here they are so: while, if she was under any erroneous impression, it was not as to the meaning of the words she employed, but as to the legal position in which these expressions placed the parties, a matter in which I hold it to be clear that a Court of law can grant no relief. Under the trust-deed and the letter of September 1840, there could be no doubt as to the rights of Lady Sempill. She was absolute *fiar*, with no other limitation than a mere destination to her heirs and assignees. The trustees were bound, on the death of the truster, to convey the whole of the residue to Lady Sempill and her heirs and assignees. Then came the letter of 22d July 1841. By it Miss Austin “depones and bequeaths” to Miss O’Reilly the succession, not to the testatrix, but to Lady Sempill; and that on the narrative that she has little expectation of her ladyship having children. Now, is there here any ambiguity? I think not. For the former letter of instructions had called to the succession of the residue Lady Sempill, and her heirs and assignees; and now, on the recital of the small probability of her ladyship having heirs of her body, she calls not to the succession of herself, but to the succession of Lady Sempill, her own grand-niece Miss O’Reilly. This is, on the clearest principles of construction, just the substitution of Miss O’Reilly for the heirs and assignees of Lady Sempill. Both the one and the other are called as mere substitutes, Lady Sempill remaining the unlimited *fiar*. No doubt, it is asked with some confidence, whether it can be supposed probable that the testatrix, wishing Miss O’Reilly to succeed, left that succession at the mercy of the will of Lady Sempill. It is possible the testatrix imagined that she had secured the succession to Miss O’Reilly, though of that we have no positive assurance. But if she had that belief, upon what did it rest? Upon this, that the appointment of a successor or substitute to Lady Sempill legally prevented her ladyship from defeating that right of succession. Now, that was an error in law which no Court can remedy. If the terms employed have a clear definite meaning, we must give effect to that meaning, whatever reason there may be for suspecting that the granter of the deed was not quite aware of the situation in which it left the parties called to the succession. Now, here Lady Sempill is clearly called to the succession as unlimited *fiar*; and though there is a substitution of Miss O’Reilly, that leaves the right of her ladyship in full force, and to that right we must give effect.

LORD IVORY. I am also of opinion that the interlocutor of the Lord Ordinary ought to be adhered to. There is and can be no dispute as to the abstract principles of construction to be applied to the case. The question is one purely of intention. The writings are such that this intention is to be sought (but always on a reading of the writings themselves, to the exclusion of mere extraneous considerations) according to the plain, popular, and natural sense of the language used by the testatrix. And, finally, whatever the intention thus discovered may be, there can be no difficulty as to carrying it into execution, inasmuch as the powers conferred upon the trustees are sufficiently ample to entitle and to enable them to invest it with all the technical forms necessary for giving to it the most complete legal effect. What, then,

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June 30. 1853. with reference to these plain and undisputed principles, is the true reading and sound interpretation of the writings in question ?

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1. By the first, the fee, absolute and unlimited, of the residue is given, with unrestricted powers of disposal, to Lady Sempill and to her "assignees," and should she not exercise this right—or should she fail, by predecease of the testatrix, so as never to become vested in it,—“her heirs” are to come in her place, taking, in the first case, in their own right, as *conditional institutes*, and, in the second, as *succeeding* to her in the capacity of *substitutes*. Now, it is of importance to notice, from this mention of “her heirs,” that the idea of a party who should take as Lady Sempill’s “successor” “to succeed in all my landed property,” &c., was a matter not beyond, but quite within the scope of the deceased’s *intention*. And though the successor thus pointed at is, as it happened, made coincident with the party who would otherwise also have been successor *provisione legis*, it was still by force of the instrument, and *provisione hominis*, that the destination was so fixed. The testatrix, therefore, did appoint a successor to Lady Sempill, even in this first writing, and she selected for this successor her ladyship’s “heirs” general; not, observe, her own children merely, or “heirs of her body,” but “her heirs” generally, *i. e.*, her heirs whomsoever, whether her own children or others. Another observation occurs—that, while the testatrix in this way had it completely within view to deal with the question, Who should succeed to Lady Sempill? she gave no directions whatever for *securing* the line of succession thus chosen against the hazard of evacuation from the act of Lady Sempill, after the fee had once come to vest in her ladyship herself. On the contrary, the substitution was at best but a *simple destination*.

2. In the second writing of 1841, I can discover nothing which can point, either directly or indirectly, by express words or by implication, at the *revocation* of any right or interest which had previously been conferred upon Lady Sempill. If the estate given her was one of unqualified property, there is nothing to engraft upon it in Lady Sempill’s person any limitation or qualification whatever. On the contrary, it appears to me, that the only matter moving the testatrix to make any change at all was not any thing connected with the measure and extent of Lady Sempill’s right while she lived, but solely and exclusively the question who should be her *successor* upon her death. She thought that Lady Sempill was now to die *childless*. She knew that she had before settled the succession, so far as she meant to settle it, on her ladyship’s *heirs*. She no longer wished to leave this as the destination of her deed; but was desirous to substitute, in the place of Lady Sempill’s heirs, a succession of her own appointment. And so, accordingly, she nominates Miss O’Reilly as *Lady Sempill’s* successor. But, that done, all else remains as before. This interpretation satisfies and exhausts the words of the writing. Beyond this all is nothing but conjecture and guess. The very idea of a *successor* necessarily implies that there has been a party *antecedently* in the same right; and wherever one is to take *jure successionis*,—whether *ex provisione hominis* or *ex provisione legis*—the measure of right thus succeeded to is and must be the measure of right that was in the predeceasing. Besides, it is very plain that in the mind of the testatrix Lady Sempill, and not Miss O’Reilly, bore the place of *persona prædilecta*. She it was that

was to take first and primarily. The latter was only to *succeed*, or take in June 30. 1853. the second place, after she was gone. Is it reasonable to suppose that the deceased, in such circumstances, intended to confer the larger benefit on the postponed Miss O'Reilly, the smaller upon the preferred Lady Sempill—to give the former an unlimited estate of fee, and to restrict the latter to a bare liferent, or to a fee so fettered as in substance to be equivalent? But farther, the first writing directs the trustees “to pay and make over” the estate, heritable and moveable, to Lady Sempill. The second appoints Miss O'Reilly “to succeed” to her ladyship. Are the trustees, then, not to pay and make over to her ladyship, but to hold on, in face of the positive direction of the testatrix, until they can pay and make over to Miss O'Reilly? The deed directs payment, once for all, of the “whole residue of my estate and effects, heritable and moveable.” The codicil does not revoke this, or contain a word to countenance the notion. A right to *succeed* does not infer revocation. But it is compatible, and indeed only to be reconciled with the respective and successive rights of two parties, who are to take, the one after the other, the same estate; nor is there any substance in the argument that this would leave Miss O'Reilly a mere nominal interest in the succession, without either substance or reality. So far as the *deed of the testatrix* goes, it is not so. She gives under that deed all that any substitute heir can ever get as a mere successor to the institute under a simple destination. No doubt, this right may be *evacuated* by the separate deed of Lady Sempill. But so would the right of any other substitute in the case supposed. It is not on this single account, therefore, to be assumed that the testatrix *could* not or *did* not mean to leave Miss O'Reilly's interest to be thus defeasible; otherwise every simple destination would be equally open to the conclusion, and so be equally placed beyond the scope of the maker's intention. *In dubio*, an intention to fetter is never to be presumed; much less is it to be so in a case like the present, where the effect would be to sacrifice the interests of the *persona prædilecta* to those of a postponed and merely secondary party.

3. It is perhaps unnecessary to pass on to the codicil of May 1846. Yet, so far as in the absence of express words, an intention not to revoke is to be inferred from a writing in which the party shews a knowledge how to execute such a revocation; when such is truly his purpose, this codicil is not without importance. The previous writing, as has been seen, conferred the entire residuary estate, heritable and moveable, upon Lady Sempill. The present codicil deals with a portion of that residuary estate. Does it not at once occur to ask, why, if the deceased intended to revoke the right, originally conferred upon Lady Sempill, *to all the rest of the succession*, except as regards the mere limited estate of liferent, she did not in equally plain terms, as are here directed to the case of a mere portion of that residue, announce her purpose so to do? Or again, as *enumeratio unius est exclusio alterius*, does it not follow from this express, but partial, revocation, which is limited merely to the house and furniture, that there was no intent or purpose to revoke, *quoad ultra*. And finally, if it really was the case that the second codicil had *already* revoked *quoad* Lady Sempill her original estate of *fee* in the residuary estate generally, how came this subsequent and further revocation not to be confined to Lady Sempill's mere *liferent* of the house and furniture,

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June 30. 1853. if that were indeed all that her interest now amounted to, as regarded either that or the rest of the estate? On the whole matter, I am of opinion that so far as Lady Sempill is concerned, no interest originally conferred upon her was revoked or taken away by the codicil of 1841, and that all that that codicil operated in favour of Miss O'Reilly was to alter the previous destination in favour of Lady Sempill's heirs, and in their stead to nominate Miss O'Reilly as her ladyship's successor substantially like them in the character and with no stronger right than that of an ordinary substitute in a simple destination.

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LORD ROBERTSON also gave his opinion in favour of the interlocutor of the Lord Ordinary.

The COURT accordingly, "In respect of the opinions of the majority of the whole Judges who heard the case, in the reclaiming note for the trustees of Miss Collins Austin, adhere . . . Find them liable in additional expenses, . . . and in the reclaiming note for Miss O'Reilly, Alter the interlocutor of the Lord Ordinary in so far as it finds her liable in expenses, and *quoad ultra* refuse the prayer of said reclaiming note, and adhere," &c.

Pearson & Robertson, W.S., Agents for Lady Sempill.

Alexander Smith, W.S., Agent for the Trustees.

James Carnegie, Junr., W.S., Agent for Miss O'Reilly. (J. M. M.)

No. 236.

GRAHAM v. M'LACHLAN.

Reparation—Privilege—Malice and want of probable cause—Issue—Bill of Exceptions—Process.—A party raised an action of damages against another for entering his premises and carrying away articles of property, as having been stolen from the defender. It was averred in defence, (and afterwards proved at the trial,) that the defender had acted under a valid legal warrant executed by constables; this averment the pursuer denied, resting his action on a wrongous and illegal entry and seizure, made maliciously and without probable cause. The issue sent to the Jury was, whether the seizure in question had been made by the defender, "by himself or by others in his name and acting under his order and authority, wrongfully and illegally." The presiding Judge charged the Jury, that the warrant was legal and valid, but that the pursuer was nevertheless entitled to a verdict if the jury were satisfied that the entry and seizure had been made by the defender maliciously and without probable cause. Verdict for pursuer. On bill of exceptions, *Held*, that this charge was bad, and that the Judge ought to have directed the Jury, 1st, to find for the defender if the entry and seizure had been made under the warrant; and, 2d, that it was incompetent for the pursuer *under his record and issue* to prove that in applying for the warrant the defender had acted maliciously and without probable cause. *Opinion*, That, however the law might stand in cases of *slander*, it is incompetent for the pursuer, in actions of damages for malicious prosecution, to convert an unprivileged into a privileged issue in the course of the trial, by leading evidence of malice and want of probable cause; these qualities not being in the issue.

2d Division. Graham raised action of damages against M'Lachlan, on the narrative, that
July 2. 1853. on 10th April 1851, the defender had by himself, "and along with others in his name and acting under his authority," entered and searched the pursuer's premises, and carried away therefrom a quantity of lead, the pursuer's property, "under the false and calumnious pretext that the said lead was the defender's property, and had been stolen from his premises." Article 5th of the pursuer's condescendence bore, "That the defender's conduct in the premises has been exceedingly wrongful, unjust, oppressive, and lawless, and

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he is liable in damages and *solatium* to the pursuer." In defence M'Lachlan July 2. 1853. averred, that having had lead stolen from him on the night of the 7th April, and having received information, which he believed, that next day lead had been seen in suspicious circumstances in the pursuer's workshop, he had communicated his loss and this information to the district constable, who reported to the superintendent of police at Dumbarton; that the latter then prepared a petition to the Justices, in the name of the defender, who signed it; and that a regular search-warrant was thereupon granted by a Justice, upon the authority of which the constable, along with another, made the search and removed the lead to the police office, where it was retained a reasonable time for inquiry and identification, and then returned to the pursuer. He pleaded, that the pursuer's premises having been searched, and the lead taken possession of and secured for a time by the proper officers of the law acting under a legal warrant, the action was untenable; at all events, that a case of privilege was disclosed, and the pursuer had not averred malice and want of probable cause. Thereupon the pursuer, upon leave, amended his summons, substituting in room of article 5th the following:—"That the defender acted in the premises illegally and oppressively, or illegally, oppressively, maliciously, and without probable cause, and is liable in damages and *solatium* to the pursuer." He also, upon revisal, denied that any valid and legal search-warrant had been granted at the defender's instance. The case went to trial before Lord Anderson on the following issue:—"Whether, on or about 10th April 1851, the defender, by himself, or by others in his name and acting under his orders or authority, wrongfully and illegally entered the premises of the pursuer, situated in Alexandria, and county of Dumbarton, on the false and calumnious allegation that 8 cwt. of sheet-lead, or thereby, had been stolen from the defender's premises, and had been carried into and melted in the workshop or other premises occupied and possessed by the pursuer, and did then and there wrongfully and illegally seize and carry off from these premises, and thereafter detain, or cause to be detained, a quantity of lead in bars belonging to the pursuer, on the false and calumnious allegation that the said bars of lead so carried off was the sheet-lead which had been stolen from the defender's premises, and truly belonged to him and not to the pursuer, to the loss, injury, and damage of the pursuer?" At the trial, the above-narrated state of the facts alleged by the defender M'Lachlan having been proved, Lord Anderson directed the Jury, in point of law, that the warrant of 10th April 1851, "was a legal and valid warrant, but that the pursuer was nevertheless entitled to a verdict if the Jury were satisfied on the evidence that the entry to the premises and seizure of the lead had been made by the defender, or by others in his name and acting under his orders or authority, maliciously and without probable cause." The defender's counsel excepted to this charge, and required the Judge to direct the jury, "That if the entry of the pursuer's premises, and the seizing and carrying off of the lead were by police constables, acting under and by virtue of the search-warrant of 10th April 1851, the defender was entitled to a verdict in his favour." Further, "That under the summons, record, and issue, it was incompetent for the pursuer to prove that in applying for the said warrant the defender had acted maliciously and without probable

July 2, 1853. *Graham v. M'Lachlan.* cause. And the said Lord Anderson having refused to direct the jury as above required, the counsel for the defender excepted to said refusal." Verdict for pursuer.

G. Young, and Dean of Faculty, now appeared to support the bill of exceptions. The action as libelled founds on the proceedings of *M'Lachlan* as *lawless and unwarranted*. With this the amendment of the libel is wholly inconsistent, for a lawless action founds a good claim of damages whatever may have been the motive to it. The pursuer's issue was taken in conformity with his record, and at the risk of its coming out in evidence, as it did, that the defender's allegation of having acted under a legal warrant was true. The pursuer cannot be allowed at the trial to turn round and offer to prove a different case, viz., that the defender applied for or used a good warrant maliciously. The Judge's direction is thus totally inconsistent with the pursuer's case. But, further, the issue does not contain malice and want of probable cause; and it is incompetent at the trial to convert an unprivileged into a privileged issue.

Millar, and Logan, in support of the direction and verdict. By the amendment, the averment of malice and want of probable cause became part of the pursuer's case on record. That case is based on an illegal and wrongous act by the defender. Now the proceedings founded on may be illegal and wrongous, so far as the defender is concerned, though following on a valid warrant. [LORD JUSTICE-CLERK. That is not the meaning of illegal. We do not call a pouncing illegal which proceeds on a valid warrant.] A pouncing may undoubtedly be called illegal if no debt was due. A warrant is granted *periculo petentis*; the party getting it may so conduct himself as to take himself out of its protection, so that his actings will be considered as entirely unprotected and unprivileged. This is a question for the Jury. [LORD JUSTICE-CLERK. Notice of such a case ought to have been given on the record.] Further, the pursuer of an unprivileged issue may prove malice and want of probable cause, if the defender makes out a case of privilege at the trial: so these qualities need not necessarily be in the issue; *Fenton v. Currie*, 22d February 1843; *Dunbar v. Stoddart*, 15th February 1849; *Smith v. Green*, 10th March 1853.

LORD JUSTICE-CLERK. While I think the direction wrong, I can well understand how, in the first case of the sort which has occurred, and without a full argument on the special question raised by this record, the Judge might be led to think this case could be dealt with in the same manner as *Fenton v. Currie*. While it is one, however, which must be decided on the peculiar facts raised, yet it involves a most important principle of very general application.

In the case which the pursuer averred on record, he represented the defender as, *at his own hand, and of his own authority without any warrant*, entering his premises in his absence, searching the same, and forcibly taking possession of lead on the false and calumnious averment, that it had been stolen from him. That such a proceeding (unless stolen property had been followed red hand), would have been illegal, cannot be disputed. For such an act, privilege there could not be. On the other hand, the defender

from the first averred, that having had lead stolen from him, he had searched the pursuer's premises for it in virtue of a regular legal warrant, which was exhibited and executed by officers of the law. The pursuer, as the evidence shews, must have known whether this case was consistent with the facts. He was not bound to admit the facts averred by the defender, and so to admit the case to be under any privilege. But it was his business for his own interest to consider well whether he was to institute, and still more to continue, an action resting on the statement of facts which he chose to make the basis of his action, which he ought to have seen that the defender's case, if proved, would altogether displace. He ought to have seen that if the defender's case was consistent with the facts, his remedy was to be obtained by a complaint of an entirely different character; viz., that legal proceedings had been taken to give legal warrant to this search *from malicious motives, and without probable cause.* July 2. 1853.
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If a pursuer states a case which raises no protection, he is entitled to take an issue to try it without admitting any privilege, and he cannot of course be compelled to prove malice and want of probable cause, when his case, as he sets it forth, is one which, if proved, will deprive the defender of any privilege. But then, on the other hand, the defender, if he has set forth his case on record, may on the facts proved at the trial, raise his defence of privilege without any counter issue, and so exclude the pursuer's case; see *Hamilton v. Hope*, and *Fenton v. Currie*. Hence the pursuer takes the risk of his issue not being suited to the real character of the case. A defender has stated his case in defence on record; if documents are referred to, they must be produced, or can be recovered in time for a pursuer to amend, if at the time of raising his action, he was under any ignorance of the facts. But after the parties come into Court, surprise at the trial on such a matter there cannot be. The pursuer, if he finds that he has to encounter a case of privilege, may admit the privilege and undertake to overcome it by the proper averments, provided these are allowed as an amendment of an open record. Perhaps the amendment in this case was intended to enable the pursuer, if he ultimately thought it expedient, to adopt that course. But if so intended, it was clearly insufficient at the trial, after the issue which he deliberately took on the closed record. In the case of *slander*, it has been thought that, when the defender raises his case of privilege in defence on the facts as they actually come out at the trial, the pursuer may overcome the privilege by proving, that while the occasion was one which gave the defender privilege, yet he used the injurious language from malice, and without probable cause in the culpable design of injuring the pursuer. Assuming at present that this is competent in a case of slander such as *Fenton v. Currie*, the distinction is plain between such a reply in that case, and any attempt to act on the same rule in a case of damages for malicious prosecution. In cases of slander, the true ground of action is the fact that the words were spoken, and that they were defamatory and injurious to the pursuer. It is the same ground of action, the same injury, whether the occasion was privileged or not. If the pursuer do not admit the privilege, and do not set forth the facts which raise it; but if the facts proved shew for the defence that the occasion was privileged, then when the pursuer in reply offers to prove that the privileged occasion was made use

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of maliciously, and without probable cause to utter the slander, for the purpose of injuring him, the fact of which he complains is not thereby changed. He complains still of the character and effect of the words spoken, but he proves the *animus* with which these words were spoken, and establishes by direct proof that there existed personal malice against him individually. In the ordinary case the law assumes malice when the words are calumnious; and when the pursuer in answer to the defence of privilege undertakes to overcome it, he is only proving the malice which in the ordinary case is assumed; but he in no degree changes his ground of action. Hence the proof of malice may be admitted in answer to the defence quite consistently with the pursuer's case on record. But in a case of malicious prosecution, such as this one, it is different: the ground of action by such answer to the defence would be fundamentally changed—the fact complained of would be wholly different from that to which the pursuer's issue relates. The pursuer, as in this case, alleges that his house was illegally entered by the defender, a private party, at his own hand, and his property forcibly and illegally carried off. The fact complained of is an illegal search and seizure by a private party without authority. The defender then avers and proves that he did nothing illegal or without authority—that he regularly applied for a search-warrant from a magistrate—and obtained one directed to officers of the law, who carried through the search in a proper and regular manner. If the pursuer then says in answer, I will prove malice and want of probable cause: in what is he to prove that malice? Why, in the application for the warrant. That would become the fact complained of. But then that is a totally different ground of action from the case stated in his issue, viz., an illegal and unauthorised search and seizure. The defender having applied to the proper authorities, and obtained a regular warrant, which was executed by proper officers, then the entry and seizure were not *illegal*. They may be the cause of injury, and give rise to a claim of damages, if the party applied for and obtained, the warrant maliciously and without probable cause. But then the ground of complaint would be, that he did so apply maliciously for the warrant, and *therefore* that what followed in its execution was a wrong. The whole gist of the complaint in such a case is the malicious application for the warrant. Hence the answer in such a case to the defence of privilege does not go to support and set up the pursuer's original case, (as in the case of slander), and to establish his issue as against such a defence, but goes directly to make out a case substantially distinct from that in the issue, and importing another distinct ground of action.

In the present case the facts at the trial disclosed privilege. The result of allowing the answer to the defence would not be to establish the affirmation of the issue, which goes on the fact that the entry and seizure were without authority. That is disproved completely by the production of legal authority. The defence proved wholly displaces the case of the pursuer, and shows that his issue is inapplicable to the facts, and that if there is any wrong to complain of, and if he has a case, it is one which his issue will not cover, in any view which can be taken.

What is the meaning and effect of the direction given to the jury? I have great difficulty in understanding it and in knowing with certainty in what

part of the proceedings the Judge meant that the jury must look for the malice. Does it mean that the malice is to be found in the application for the warrant? In that case the direction is very obscurely and inaccurately worded for the guidance of a jury, and I think it wrong on all the grounds excepted to. But without at present dwelling on them, the first question which occurs, is, how shall such malice make out the entry and seizure to be one made by the defender without authority, and therefore illegal? The fact that the entry was under legal warrant is not altered by proof that the party obtained that warrant from malicious motives, and without probable cause; and if the charge means that such proof may make the entry and seizure illegal, in the sense and meaning and under the terms of this issue, the direction is clearly bad, as tending to set up the issue and the case therein contained upon a ground which, in law, utterly dislodges and destroys that case. But another very decisive objection, the importance of which was strongly felt in the case of *Hamilton v. Hope*, is, that the direction is so ambiguous that a jury were not likely to know or infer that the malice must be found in the application for the warrant, a matter as to which they could know nothing and were told nothing, but were likely and entitled, as ordinary men, to assume, that if they anyhow saw any evidence of malice they might hold the entry and seizure under a legal warrant to be illegal, since they were not told that (if the proof of malice under this issue was competent) it must be malice in the application for the warrant; and hence they might, most reasonably, from the terms employed infer that, though the warrant was honestly and rightly applied for, and was legal and valid, they might look to any evidence of after malice, and on that ground hold the entry and seizure to be illegal. But then this latter view of the direction may have been, and the pursuer contends that it was, the meaning of the Judge. I should object in any view to such a direction, if such was its meaning, which I greatly doubt, as so indefinite, so little within any rules of law, as to leave a jury entirely to themselves to do just what they pleased, and to take any view they chose of the case, and that in a matter in which a jury most peculiarly requires distinct and definite direction. I am quite ready to admit that it would be quite a relevant case to aver that, although a party did honestly apply, in such circumstances as occurred here, for a warrant on fair grounds of belief, yet that after he had obtained it, and while it was in his power to interfere, he became fully aware that no theft was committed from himself, or that his property had been recovered and was elsewhere, and that in the full knowledge that the search was most improper from the facts he had ascertained, yet from malice and the desire to injure, he allowed the warrant to be executed when he knew that the only result which could follow was injury to the other's character. But then such a very special and singular case, though relevant, must be averred in pleading, and put distinctly in the issue as the case which the pursuer intends to prove, and which the defender has to meet. I cannot conceive any thing more loose and dangerous, than, after the defender has established a clear case of protection, by proof of regular application for a warrant, against the honesty of which application no proof is competent *ex hypothesi*, to allow the pursuer, in answer to that defence, to set up so very peculiar a case as I have now supposed, in complete contradiction to his own case, and wholly inconsistent with his issue,

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and to permit a jury in such a loose and hap-hazard manner to find damages under this issue. But in order to come to that result, the direction must import, in this view of its meaning, that the jury might affirm the question in the issue, and the verdict must accordingly affirm and set up the issue; and so it does accordingly find the entry and seizure to be illegal. But how can the direction lead correctly or legally to this result? If the entry and seizure were malicious, that might be a ground of a claim for damages, because, although legal, it was done from the design to injure and without probable cause, under the cover of legal authority. But would that view lead to the result, that while there was a legal and valid warrant under which alone the entry and seizure was made by officers of the law, it could competently and truly, either in point of law or fact, be found that the defender made the entry on his own authority, without warrant and legal authority, and that the entry and seizure was therefore illegal, although the first part of the direction holds that there was complete legal authority for these acts, and that they were not done by the defender and others under his own authority. The direction then is wholly inconsistent with itself, and leads to direct contradiction; and the right directions plainly were those which the defender's counsel required the Judge to give to the jury. They are couched in two propositions, both of which the Court are of opinion are correct in point of law.

The great and insurmountable error in the direction which the Judge did give, is in allowing the pursuer, when the defender proved his privilege to enter in answer thereto on the question of malice and want of probable cause, in order not merely to overcome the privilege, but to obtain by that separate case a verdict on this particular issue, which no such case could possibly set up and establish. In support of the course so taken at the trial by the Judge, the pursuer pressed upon us the mode in which the case of *Fenton v. Currie* was disposed off—the understanding which that case certainly has created—and the view taken of its import in *Dunbar v. Stoddart* by Lords M'Kenzie, Fullerton, and Jeffrey. Whether in a case of slander it has been actually fixed, that what it was proposed at the trial in that case to allow the pursuer to do in order to overcome the privilege, is really competent in such a case under such an issue, I do not at present propose to consider. I am ready to hear that point—which is in no degree necessary for the disposal of the present case—more formally discussed, when it shall arise, than it has yet been. But I must add that I am not disposed to disturb the understanding which has grown out of the case of *Fenton*, and been acted upon in others. But assuming in favour of the pursuer that it would be competent to the pursuer in such an action as in *Fenton v. Currie*, when the defender shewed that the injurious words were spoken in a privileged state of facts, to destroy the privilege by proof of the feeling and enmity with which under cover of that privilege, occasion was taken by the utterance of the words to injure him, still, on the grounds I have already explained, it is in my judgment very plain that the course permitted to the pursuer in this case was wholly incompetent, and that the distinction between the competency of such a course in a case of slander and in an action of damages for an illegal search, when it appears that the party regularly applied for legal authority, and thus establishes his protection by proving a state of facts to which the issue of the

pursuer cannot apply; the distinction I say is so marked and decided that ^{July 2. 1853.} the case of *Fenton* cannot apply to the present. But we were pressed by a recent judgment in the other Division on 9th March, *Smith v. Green*. That ^{Graham v. M'Lachlan.} was an issue for damages on account of wrongous apprehension. The defender on record averred no privilege, stated no facts on which he could claim privilege, and had no plea of privilege—at the trial the Judge ruled, “that on the evidence which had been led there was a case of privilege disclosed, and that it was necessary for the pursuer to prove malice and want of probable cause.” The Court took up the objection that the defender had not averred or pleaded any privilege. This being their ground for setting aside the verdict, then there was no privilege pleadable in the case, and hence it was not necessary to prove malice and want of probable cause, and therefore there could be no question there as to the competency of over-coming in such a case the privilege when properly raised by evidence of malice and want of probable cause. No such point could really be decided if the record excluded the defender from pleading privilege. On the whole I think we must sustain the exceptions.

LORD COCKBURN. We are prevented by statute from trying any cause except upon issues, not the spontaneous issues into which a properly framed record naturally flows; but issues extracted before trial by the Court. These issues form the only rudder by which the cause can be steered at the trial. Once framed, they are what the parties must stand upon, or fall. The formation of a new issue, in the course of a trial, is repugnant to our whole scheme of procedure. It would just be going to trial without an issue against the express direction of the statute. I am of opinion that the direction given by the Judge at the trial of this case was wrong, because it warranted the jury to decide against the defender, if they believed that he acted maliciously and without probable cause; whereas, since the pursuer, as the evidence turned out, required the existence of these qualities for his success, then, as he had them not in his issue, the correct result was, that, whatever he might make by any other proceeding, he must necessarily lose the verdict under the only issues that the jury had been sworn to try. I think this is fixed by the cases of *Fenton* and of *Dunbar*, in which the principle, that, where a defender's evidence extinguished or superseded the pursuer's issue, the pursuer must lose the verdict, was recognised by nearly all the Judges. But indeed I require no authority on the subject,—for how can it be doubted that a pursuer cannot obtain a legal verdict by first taking, and then proving, an issue, which, in the circumstances, does not entitle him to obtain it? He cannot abandon the issue which he took, and introduce a new one in the course of the trial, merely because his existing issue, though it suited his anticipation of the facts, is discovered not to suit their truth. Nor is there any peculiarity raised by the circumstance of privilege. The very same thing may occur in any other case where a pursuer chooses, or is compelled, to be precise as to any particular circumstance, and discovers in the progress of the evidence that he is wrong as to that circumstance. *Time* and *place*, for instance, and the *character* in which a thing was done, are constantly set forth in issues, so as to be essential to a party's success. Was it ever heard of that a pursuer, whom the evidence detects in an error as to these, can escape from the con-

July 2. 1853.

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M'Lachlan.

sequences by raising a case at the trial entirely out of the issue? If this were competent, precision in issues would be useless; and, in particular, no person ever need trouble himself by setting forth malice and want of probable cause, because he would know, that he may resort to these, if necessary, at the trial.

LORDS MURRAY and WOOD having concurred,—

The COURT, accordingly, “Sustain the exception taken to the charge given to the jury: Find that the jury should have been directed by the Judge, in point of law, that if the entry of the pursuer’s premises and the seizing and carrying off the lead were by police constables acting under and by virtue of the search-warrant of 10th April 1851, the defender was entitled to a verdict in his favour; and also that under the pursuer’s record and issue it was incompetent for the pursuer to prove that in applying for the said warrant of 10th April 1851 the defender had acted maliciously and without probable cause: and, therefore, Set aside the verdict: Find the pursuer liable in the expenses of this bill of exceptions,” &c.

John Cullen, W.S., Pursuer’s Agent.

Alexander Hamilton, W.S., Defender’s Agent.

(J. M. M.)

No. 237.

MORISON v. MACKENZIE.

Act of Sederunt 1846—13 and 14 Vict. c. 36—Process—Jury Trial—Lead.

1st Division.

July 6. 1853.

Morison v.
Mackenzie.

In this case issues had been adjusted in the Inner House, and the case remitted back to the Lord Ordinary. Under the Act of Sederunt, 24th February 1846, if the pursuer does not give notice of trial within ten days after the issues are adjusted, he loses the lead, and it is competent for the defender to give notice of trial. The pursuer had not given notice of trial within ten days after the issues were approved of, but he enrolled the case after the ten days had expired, for the purpose of moving the Lord Ordinary to fix a day for the trial. Before notice of that enrolment was conveyed to the defender, and on the same day, the defender had given notice to the pursuer of trial to take place on circuit. The question therefore arose, whether the pursuer had lost the lead, or whether the provisions of the Court of Session Act did not supersede the Act of Sederunt as to cases depending before the Lord Ordinary.

LORD RUTHERFURD verbally reported the case.

Logan, for the pursuer.

Maitland, for the defender, referred to *M'Neill v. Caldwell and Shedden*, ante, p. 326. The provisions of the Act of Sederunt of 1846 were there held to be still operative; but motions actually made before the Lord Ordinary to fix a day for trial held to be equivalent to notice of trial. Here no such motion had been made.

The LORD PRESIDENT. During the time the pursuer had the power of taking the lead was it not competent for the defender to move the Lord Ordinary to fix a day for trial? If so, does the Act supersede the privileges of the pursuer as to the lead, and not those of the defender also? If the defender has grounds for the trial taking place on Circuit, instead of before the Lord

Ordinary, the Lord Ordinary will hear these and decide. We think it perfectly competent for the pursuer to make the motion. July 6. 1853.

J. W. Mackenzie, W.S., Pursuer's Agent.

Alexander Hamilton, W.S., Defender's Agent.

(J. S. M.)

Morison v.
Mackenzie.

FORBES v. FORBES AND OTHERS.

No. 238.

Trust-Deed—Entail—Destination.—A truster directed a strict entail to be executed "upon the series of heirs after-mentioned," calling first to the succession his heirs-male, and next his heirs-female, after whom his natural son and his heirs-male, and so on, the destination being the same as in pre-existing entails referred to. The truster died leaving no lawful issue:—*Held*, that the natural son, although the first party called, was not institute, but subject to all the fetters directed against "heirs and substitutes."

5 Geo. IV., cap. 87—*Trust-Deed—Entail—Provisions to Widows and younger Children.*—The trust-deed contained no instructions as to inserting provisions for widows and younger children. The Aberdeen Act, which rendered it unnecessary to insert in an entail express power to grant such provisions, was repealed two years before the truster's death, but was in operation at the date of his executing the trust-deed, and also two previous entails referred to therein:—*Held*, that the truster's silence could not be construed as an intention that the heirs should possess such power of granting provisions, and that it proved nothing more than that the truster did not mean to give any power beyond that which existed by law.

This was an action of declarator at the instance of William Nathaniel Forbes against the trustees of the deceased Lieutenant-General Nathaniel Forbes, to have it found that the fetters of an entail which the trustees were instructed to make, did not apply to the pursuer, so as to prevent him dealing with the lands entailed as a fee-simple proprietor. By deed of entail of the lands of Auchernach, executed in July 1831, General Forbes called to the succession the heirs-male of his body, whom failing, heirs-female, "whom failing, to William Nathaniel Forbes, my natural son, and the heirs-male of his body, whom failing, to Benjamin Forbes, my natural son, and the heirs-male of his body, whom failing," to certain other parties therein specified. In 1836 General Forbes executed an entail of Dunotter, in which the destination was expressed in similar terms, with this exception, that the name of one of the substitutes, who had previously died, was omitted. Both entails contained a power of revocation. In 1840 General Forbes executed a trust-disposition and deed of settlement, proceeding upon the narrative of the two deeds of entail, and reserved powers of revocation under them. The trust-deed proceeds thus:—"And farther considering, that in all probability my said two surviving sons, William Nathaniel Forbes (the pursuer) and Benjamin Forbes, or either of them, will succeed to me as my heirs of entail, and that they are both under age, and that I have other means and estate which I am desirous of vesting in trust for the purposes after specified, and that I am also desirous, in so far and for the particular reasons and purposes after mentioned, to exercise my reserved powers under said deeds of entail." The deed then contains a general disposition to the trustees of the whole estate, funds, and effects, heritable or moveable, "at present belonging, or which shall pertain and belong to me at the time of my decease, including also my whole lands and estates, both entailed and unentailed, but as regards my entailed lands and estates only, to the effect and for the special purposes after mentioned," &c.

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Graham v.
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sequences by raising a case at the trial entirely out of the issue? If this were competent, precision in issues would be useless; and, in particular, no person ever need trouble himself by setting forth malice and want of probable cause, because he would know, that he may resort to these, if necessary, at the trial.

LORDS MURRAY and WOOD having concurred,—

The COURT, accordingly, “Sustain the exception taken to the charge given to the jury: Find that the jury should have been directed by the Judge, in point of law, that if the entry of the pursuer’s premises and the seizing and carrying off the lead were by police constables acting under and by virtue of the search-warrant of 10th April 1851, the defender was entitled to a verdict in his favour; and also that under the pursuer’s record and issue it was incompetent for the pursuer to prove that in applying for the said warrant of 10th April 1851 the defender had acted maliciously and without probable cause: and, therefore, Set aside the verdict: Find the pursuer liable in the expenses of this bill of exceptions,” &c.

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The LORD PRESIDENT. During the time the pursuer had the power of taking the lead was it not competent for the defender to move the Lord Ordinary to fix a day for trial? If so, does the Act supersede the privileges of the pursuer as to the lead, and not those of the defender also? If the defender has grounds for the trial taking place on Circuit, instead of before the Lord

Ordinary, the Lord Ordinary will hear these and decide. We think it perfectly competent for the pursuer to make the motion. July 6. 1853.

J. W. Mackenzie, W.S., Pursuer's Agent.

Alexander Hamilton, W.S., Defender's Agent.

(J. S. M.)

Morison v.
Mackenzie.

FORBES v. FORBES AND OTHERS.

No. 238.

Trust-Deed—Entail—Destination.—A truster directed a strict entail to be executed "upon the series of heirs after-mentioned," calling first to the succession his heirs-male, and next his heirs-female, after whom his natural son and his heirs-male, and so on, the destination being the same as in pre-existing entails referred to. The truster died leaving no lawful issue:—*Held*, that the natural son, although the first party called, was not institute, but subject to all the fetters directed against "heirs and substitutes."

5 Geo. IV., cap. 87—*Trust-Deed—Entail—Provisions to Widows and younger Children.*—The trust-deed contained no instructions as to inserting provisions for widows and younger children. The Aberdeen Act, which rendered it unnecessary to insert in an entail express power to grant such provisions, was repealed two years before the truster's death, but was in operation at the date of his executing the trust-deed, and also two previous entails referred to therein:—*Held*, that the truster's silence could not be construed as an intention that the heirs should possess such power of granting provisions, and that it proved nothing more than that the truster did not mean to give any power beyond that which existed by law.

This was an action of declarator at the instance of William Nathaniel Forbes against the trustees of the deceased Lieutenant-General Nathaniel Forbes, to have it found that the fetters of an entail which the trustees were instructed to make, did not apply to the pursuer, so as to prevent him dealing with the lands entailed as a fee-simple proprietor. By deed of entail of the lands of Auchernach, executed in July 1831, General Forbes called to the succession the heirs-male of his body, whom failing, heirs-female, "whom failing, to William Nathaniel Forbes, my natural son, and the heirs-male of his body, whom failing, to Benjamin Forbes, my natural son, and the heirs-male of his body, whom failing," to certain other parties therein specified. In 1836 General Forbes executed an entail of Dunotter, in which the destination was expressed in similar terms, with this exception, that the name of one of the substitutes, who had previously died, was omitted. Both entails contained a power of revocation. In 1840 General Forbes executed a trust-disposition and deed of settlement, proceeding upon the narrative of the two deeds of entail, and reserved powers of revocation under them. The trust-deed proceeds thus:—"And farther considering, that in all probability my said two surviving sons, William Nathaniel Forbes (the pursuer) and Benjamin Forbes, or either of them, will succeed to me as my heirs of entail, and that they are both under age, and that I have other means and estate which I am desirous of vesting in trust for the purposes after specified, and that I am also desirous, in so far and for the particular reasons and purposes after mentioned, to exercise my reserved powers under said deeds of entail." The deed then contains a general disposition to the trustees of the whole estate, funds, and effects, heritable or moveable, "at present belonging, or which shall pertain and belong to me at the time of my decease, including also my whole lands and estates, both entailed and unentailed, but as regards my entailed lands and estates only, to the effect and for the special purposes after mentioned," &c.

July 6. 1853.

Forbes v.
Forbes, &c.

After directing the trustees to pay the trustor's debts and certain legacies, also provisions to his wife, and making various appointments, the trust-deed provides for the purchase of lands, which the trustees are directed to settle and secure, "by a deed or deeds of strict entail, upon the series of heirs after mentioned, and under the same conditions, provisions," &c., as are contained in the entails of Auchernach and Dunotter. "And with this farther special provision and declaration, that in place of the destination contained in my said deeds of entail, the new entail or entails so to be executed by my said trustees, shall call to the succession the heirs-male of my body, whom failing, the heirs-female of my body, whom failing, the said William Nathaniel Forbes, my natural son, and the heirs-male of his body;" and after giving the whole destination, "but with and under the conditions, &c., in my said deeds of entail; and in case my present intentions of re-entailing my said estates of Auchernach and Dunotter, or adding a supplementary entail in consequence of the change of destination which I have now finally resolved upon, should from any cause not be carried into execution, it is my wish and desire that my said trustees shall, as soon as convenient after my death, make up and complete titles to my said estates of Auchernach and Dunotter, and strictly re-entail the same according to my intentions as expressed in this deed; it being my particular wish and desire that the destination of my said estates of Auchernach and Dunotter should be to the same series of heirs as those immediately above mentioned, and in addition thereto, it is my wish and desire that my said trustees shall strictly entail, along with my other estates, the whole of my family plate," &c.

General Forbes died in 1851 without leaving lawful issue of his body, and without having executed any new entails of his estates of Auchernach and Dunotter. In the entails executed by him, the legal rights of terce and courtesy were excluded; and no power was given to the heirs to grant provisions to their wives, or husbands, or younger children. Certain of the trustees having died, a judicial factor was, on the application of the survivors, appointed on the estate. In execution of his duty he submitted a draft deed of entail for the approval of the Court, which was remitted in common form to the junior Lord Ordinary, (Curriehill), and by him to Mr Dundas to report. In his report Mr Dundas stated that there were two questions of importance for the consideration and disposal of the Court, viz., 1st, Whether the deed of entail to be executed should be so framed as expressly to subject the pursuer, although the first party called to the succession, and entitled to succeed General Forbes in the estates in question, as disponee thereof, to the operation of the fetters directed against heirs and substitutes, or should be so framed as to make the pursuer the institute or disponee, and make the fettering conditions of the entail applicable, not to him, but merely to the heirs of entail called after him; and, 2d, Whether the deed of entail should be so framed as to enable the pursuer, and the heir of entail in possession for the time, to make provisions in favour of their widows and younger children respectively, to the same extent and effect as would have been available to such widows and children under the Aberdeen Act, the 5th Geo. IV., cap. 87, supposing the same had not been affected by the Entail Amendment Act, 11 and 12 Vict., cap. 36.

The present action was brought at the suggestion of the Court, as the most July 6. 1858. proper mode in which to dispose of these questions.

Macfarlane, and the *Dean of Faculty* for the pursuer, contended, that in ^{Forbes v. Forbes, &c.} the destination there is an express limitation of the truster's instructions, which distinguishes this case from *Lynedoch's Trustees*, 15th March 1853. Farther, at the time General Forbes executed the deeds, it was unnecessary for him to confer any express power on the pursuer or his heirs of entail, to make provisions in favour of their widows and younger children, in respect that independently of any express power, they would have the right, and be able to make such provisions in virtue of the Aberdeen Act, 5 Geo. IV., c. 87. General Forbes meant and intended that the pursuer and his other heirs of entail should have the benefit of the provision of that Act. He did nothing afterwards to indicate any change of this intention. On the contrary his deeds in their full effect as regarded the right of his heirs of entail to make provisions in favour of their widows and younger children remained at his death entire and unaltered. The Act of 1848 does not prohibit such provision. It only requires that the entailer shall expressly say so in the deed. Therefore, in seeking to have these provisions introduced, the pursuer is not doing violence to the policy of that statute, while he is fulfilling the will and intention of the truster.

A. R. Clark, Forman, Neaves, and G. G. Bell, were for various parties interested in the entail.

Ross, for the judicial factor on the estate.

The LORD PRESIDENT. Two points are here raised, 1st, Is Mr Forbes to be under the provisions of the entail at all; and, 2d, Is the entail to be framed in such a manner as to contain provisions to wives and children. As to the first question, I think it is very clear that the pursuer must be held to be subject to the fetters. The trust-deed is explicit. It must be construed as a deed of instruction to make an entail; and it is clear that the deed to be made in conformity therewith, was to be a strict entail. The fetters were to be imposed on those who are described as the series of heirs after mentioned. Now, it is as one of this series of "heirs after mentioned," that the pursuer claims. It is by accident that he gets the beneficial possession of the estate, but the direction in the trust-deed does not say that he is to be excepted from the fetters in the event of that contingency. The principle upon which an institute has been held not to be subject to the fetters imposed on substitute heirs, has no application here. These fetters are imposed on a certain description of persons, and not on those who are not comprehended within that description. Here the question is, what was the intention of the truster who imposes fetters on a certain series of heirs, and within which series the pursuer comes? The principle of the case of *Lynedoch* applies here; and, *a fortiori*, the case of *Mackenzie of Seaforth*, for there the entail was made and had come into operation. The intention is perfectly plain, and the instruction admits of only one reading. The second question must be also answered in the negative. The power under the Aberdeen Act for making provisions to wives and children to a certain extent, was a statutory limitation or relaxation of the fetters that might be imposed on future heirs. Now that Act was repealed in 1848—two years before the truster's death—as to all entails to be

July 6. 1853.

Forbes v.
Forbes, &c.

made after that date. As to future entails, the old law applies, and provisions must be found in the entail, or if not, they do not exist at all. The entail here in question of 1851, can borrow nothing therefore from the Aberdeen Act. The truster's silence as to the inserting the provisions proves nothing more than that he did not mean to give any power beyond that which existed by law. Now this is said to be a question of intention. From whence are we to gather an intention to grant such a power? The most that can be said is, that the truster did not advert to the altered state of the law; and that if he had done so, he would have given such a power. But this does not imply intention one way or the other. His mind is not directed to it at all. Therefore it resolves into a conjecture, as to what he would have done, had his mind been directed to it. But how do we know that his mind was not directed to the subject; and if he had formed a decided intention *not* to give provisions, would his instruction to his trustees not have been the same as it is? Therefore, I am afraid that we cannot supply this omission without doing violence to important rules.

The rest of their Lordships concurred.

The COURT "assolzie the defender from the whole conclusions of the summons, and decern, superseding in *hoc statu*, the question of expenses."

William N. Fraser, W.S., Agent for Pursuer.
Morton, Whitehead, and Greig, W.S., } Agents for Defenders.
J. S. Forman, W.S., }

No. 239.

WILSONS v. SIR WILLIAM DRUMMOND STEWART
AND THE EARL OF MANSFIELD.

Process—Act of Sederunt, 24th December 1838, sect. 12—Advocation—Reclaiming Note.—In an advocation, where a new record has been made up in the Court of Session and judgment pronounced thereon, a reclaiming note against such judgment is competent, although there is not appended to it the Inferior Court record.

1st Division.

July 7. 1853.

Wilson v.
Stewart, &c.

This was an advocation of an action of removing. A new record had been made up in this Court, and after closing the record and debate the Lord Ordinary gave judgment in the case. Against that judgment a reclaiming note was presented, to the competency of which—

Currie, for the respondent, objected that there was not appended to it the Inferior Court record, as required by the Act of Sederunt, 24th Dec. 1838, sect. 12 (enrolment of new causes); see also *Birtwhistle's Trustees*, 13th Jan. 1831; *Affleck*, 15th Nov. 1833.

Fraser, for the claimer. The Act of Sederunt does not apply. It proceeds on the assumption that the record in the Inferior Court is the record on which judgment has been given, and hence the necessity for printing it. But in this case the record was not the original record, but a substitutional record, and therefore there was no necessity for printing it; *Logan v. Kerwood*, 21st May 1850; *Simpson v. Summers*, 22d May 1852.

The LORD PRESIDENT. When the Judicature Act says that an interlocutor shall be final unless the reclaiming note shall be of such and such a character, a reclaiming note which has not that character is not one which keeps the interlocutor open. But when the direction in the Act of Sederunt does

not so express it, I do not think there is to be a nullity attaching to it. I July 7. 1853.
entertain the same view here as in the case of *Simpson*. No doubt the terms
of the summons and defences in the Inferior Court may be important to both parties. The question is, not whether the party is to get access to these, but whether, because they are not printed, the reclaiming note is null. I am not inclined to go that length. I think it is the duty of the reclaimer to print these, and that it is more regular that they should be printed along with the note than that they should be put on our table the night before the advising. But I cannot go the length of holding that the note presented without them is incompetent.

Wilsons v.
Stewart, &c.

LORD FULLERTON. I had some doubts as to the last case of *Simpson*, but I am not disposed to go against it. The words of the Act of Sederunt do not leave us any alternative but the words of the statute do, and I am not inclined to sustain this objection.

LORD IVORY. I am of the same opinion, and I think in principle that the case of *Simpson* is a direct precedent.

LORD ROBERTSON agreed.

The COURT "repell the objection."

John Gellatly, S.S.C., Reclaimers Agent.

Murray & Ferrier, W.S., Respondents Agents.

(J. S. M.)

MILLER v. MARSH.

No. 240.

Entail—Deed of Nomination—Revocation—Death-bed—Reduction—Heir-at-Law.—A party executed a deed of entail and relative deed of nomination, to the exclusion of the heir-at-law from the succession. On death-bed the entailor executed a deed of revocation, freeing the estate of the fetters of the entail, but declaring the deed of entail and deed of nomination still to subsist as regards the succession:—*Held* that the removing of the fetters did not affect the destination so as to create a new nomination of heirs; therefore, that the deed of revocation was not to be regarded as a deed executed on death-bed creating a nomination to the prejudice of the heir-at-law, and therefore was not reducible at his instance.

Miller, the pursuer in this case—which consisted of conjoined actions of 1st Division. reduction-improbation, and declarator—was heir-at-law of the deceased July 8. 1853.
William Henry Miller, Esq., of Craighentinny, and as such he sought to reduce certain deeds of entail and others, executed by the late Mr Miller to his exclusion from the succession.

Miller v.
Marsh.

On the 3d of March 1829 the late William Henry Miller executed a deed of entail of his lands and barony of Craighentinny and others, in favour of himself as institute, and the heirs-male and female of his body, and the heirs-male and female of their bodies respectively, "whom failing, to the other heirs of tailzie and provision named or called to the succession by me in a deed of nomination written with my own hand, and executed by me of even date with these presents, or to be named or called to the succession in any deed or deeds, nomination, or nominations, to be executed by me at any after-time during my life."

By the deed of nomination of heirs above referred to, Mr Miller called to the succession of the estates contained in the tailzie a series of substitutes. The first parties to whom it is provided that, failing heirs of his own body, the estates shall devolve and belong, are Sarah Marsh (one of the daughters),

July 8. 1858.

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Marsh.

second daughter of Thomas Marsh of Wheatley, in the county of York, "and the heirs of tailzie and provision to be appointed by the said Sarah Marsh, by any deed or nomination, or other writing under her hand, at any time of her life; whom failing, to the heirs whatsoever of the body of the said Sarah Marsh; whom failing, to Ellen Marsh, fifth daughter of the said Thomas Marsh, and the heirs of tailzie and provision to be appointed by her, by any deed or nomination, or other writing under her hands, at any time of her life; whom failing, to the heirs whatsoever of the body of the said Helen Marsh." Then follows a nomination of other parties, the whole concluding with a "whom all failing, the heirs and assignees whomsoever of the said Sarah Marsh;"—it being specially provided and declared, that "these presents are, and the nomination of heirs of tailzie and provision which the said Sarah Marsh and Ellen Marsh are hereby empowered to execute, shall be granted always with and under the conditions, &c., specified in the foressaid deed of entail."

The deed of tailzie contains all the usual prohibitions and restrictions, and clauses irritant and resolute of a strict entail directed against the institute as well as the substitute heirs, and also various other conditions and provisions: And it declares that, in the event of it, or of the deed or deeds therein referred to, then or thereafter to be executed by the granter, or by the heirs of tailzie, "being ineffectual from any cause whatever, or of the failure during my own lifetime, or during the lifetime of any descendant of my body, of all the other heirs therein called to the succession,—then, and in all or any of these cases, the deed written with my own hand, and executed by me on the 16th day of October 1827, and now remaining in my custody undelivered; or failing this, the deed executed by me on the 12th day of November 1810, also remaining in my custody undelivered, are hereby declared to be not revoked (notwithstanding the execution of these presents, and of the other deeds herein referred to), but the same shall be fully and completely effectual for securing the lands, barony, and others, property and superiority as aforesaid, herein and therein disposed to the heirs therein called to the succession, as if I had never executed these presents," (that is, the entail 1829), "or taken the titles of the said lands, barony, and others, in any different manner subsequently to the execution of the deeds above referred to, or either of them." Mr Miller then reserves to himself powers of revocation and alteration of the tailzie, in whole or in part, of the most ample description. In the deed of nomination, there is also reserved full power to revoke or alter. The deeds of 1827, and of 1810, are dispositions of his property in favour of a series of heirs different in some respects from that contained in the deed of nomination, but exclusive of the pursuer. In terms of the deed of nomination, the destination of the estates carries them completely away from the granter's heir-at-law to other parties.

The deeds of entail and nomination were, during Mr Miller's life, recorded in the register of tailzies, on the 6th of March 1829. Down to 1848 the succession to the estate of Craigentinny continued to stand upon the deeds of entail and nomination; but on the 30th of October of that year, Mr Miller, in the exercise of his reserved powers, executed a deed of revocation. After a narrative proceeding upon the deeds of tailzie and nomination, and the resolution of Mr Miller, for certain good causes and considerations, "to revoke,

recal, and rescind the whole provisions, conditions, restrictions, limitations, exceptions, prohibitions, clauses irritant and resolute, and declarations specified and contained in the said deed of entail, so as to leave the said lands and barony of Craigentenny to be taken free of fetters, and in fee-simple, by the said heirs called to the succession thereof, and to whom the same are disposed by the said deed of entail and relative deed of nomination," the deed goes on thus: "Therefore, and in virtue of the reserved powers in the said deed of entail and relative deed of nomination, to alter, revoke, or innovate and rescind the conditions and others therein written, I do hereby revoke, recal, and rescind the haill provisions, conditions, restrictions, limitations, exceptions, prohibitions, clauses irritant and resolute, and that in their whole heads, tenor, and contents, with all that has followed, or might have been competent to follow thereupon, as the said conditions and others are especially written and contained in the foresaid deed of entail: Declaring that my said lands and barony of Craigentenny and others shall belong to me, and the succession thereto descend to the heirs referred to in the said disposition and deed of entail, and who are nominated by the said deed of nomination, and that in the order of succession prescribed by the said deed, freed and discharged of the said provisions, restrictions," &c., "in the same manner, and as freely in all respects as if the said lands and barony had been disposed and conveyed to myself, and the said heirs called to the succession thereof, free of all fetters, and in fee-simple, by the terms of the said deed of entail and relative deed of nomination: Declaring always, that the said deed of entail and relative deed of nomination shall remain and subsist, to all intents and purposes, as a valid and effectual disposition and conveyance of the said lands, and others therein written, to the heirs thereby called to the succession. And I do hereby accordingly ratify, approve of, and confirm the said disposition and deed of entail, and all the feudal clauses thereof, to the effect of conveying the said lands, barony, and others, to and in favour of the heirs of entail therein named and designed or referred to, in the order of succession thereby appointed."

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Mr Miller died on the 31st day of October 1848. The date of his death, therefore, was within sixty days of the deed of revocation executed by him on the 30th October 1848, which, among others, was now called for, to a certain extent to be reduced, and it was admitted that he was then labouring under the disease of which he died. After Mr Miller's death, the succession to the barony of Craigentenny was taken up by the defender, Sarah Marsh, and a title completed in her person in fee-simple, as having right to the estate as unlimited fiar under the foresaid deeds of tailzie, nomination, and revocation.

The pursuer founded on the death-bed deed of revocation of October 1848, as a valid and complete revocation of the deed of entail of March 1829, and he contended, that in so far as the former contains a new settlement of the barony of Craigentenny upon the defender, or others, to the exclusion of his heir-at-law, it is reducible, as being executed on death-bed:—And further—and viewing the deed of revocation as only a partial revocation of the deed of entail—he contends that, in so far as it is attempted by the declarations and provisions therein made with reference to the deed of entail and deed of nomination, and, by a combination of all the three, to constitute a settlement

July 8. 1853. of the estate, in fee-simple, upon the heirs called, it is on the same ground, reducible at his instance as heir-at-law.

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Preliminary defences were lodged, pleading *inter alia*, that the sound and true construction of the deed of revocation is, that it does not touch the deed of entail and relative deed of nomination, but leaves them entire as a conveyance of the estate, whatever may be the effect of that deed with reference to the conditions under which the estate is to be taken, and therefore that the pursuer's title and interest to insist in the action is excluded by the deeds of entail and nomination.

The Lord Ordinary (Wood) repelled certain of the reasons of reduction founded on the construction of the deed of revocation, and to that extent "sustains the defences, and assoilzies the defenders, and decerns."

The other points of the case not embraced in this interlocutor were reported to the Court by Lord Curriehill, before whom the case latterly depended.

Against Lord Wood's interlocutor the pursuer reclaimed.

H. J. Robertson, and *Buchanan*, for the reclaimer. The position of the heir-at-law is, that there cannot be pushed against him the maxim of approving or reprobatng the deed of revocation at same time. He may take all the benefit of it, and it cannot be used against him; *Kerr v. Erskine*, 16th Jan. 1851. The question is, how far that deed is a revocation? It revokes everything but the feudal clauses of the deed. It altered its character as a deed of strict entail. A trust-estate cannot be extended to an absolute estate; *Bell's Com.*, 1., p. 697; so also by analogy an entailed estate cannot be extended into a fee-simple estate; *Cockburn v. Cameron*, 4th June 1836. The effect of the deed of revocation was to alter the succession and create a new nomination; for, from the mere change in the quality of the estate there is a contingent change in the destination. Anything that causes the destination to diverge is a new nomination. [LORD FULLERTON. That may arise from accident. There is a change in the effect of the deed, but there is no change in the destination.] We contend that a variance makes a new nomination.

Dundas, and *Neaves* for the respondent, were not called on.

THE LORD PRESIDENT. I think that neither upon the first nor second branches of the respondent's argument is there any tenable ground. That a new nomination on the ground of death-bed may be cut down, is a general proposition that is no doubt true; but we must first be satisfied that there is here a revocation such as puts an end to the deed of 1829. It is said that this deed of 1848 is two deeds; 1st, that it is a total revocation of the deed of 1829; and, 2d, that it is a totally new nomination of heirs, and creates a new destination. I do not think it is either the one or the other. First, it is no new conveyance. There are no conveying words in it, and it does not give the estate to any body. The character of the deed is very plain. It is calculated to create a tailzied estate into a fee-simple one. It is said that cannot be done. It is like a trust. I think the limitations and restrictions of the entail may be removed by a deed of this kind, by declaring that the party does not mean them any longer to subsist. The continuance of the estate and the rights of parties to enjoy it is a very substantial thing. The fetters imposed in the

entail is a different thing, and I think may be removed, any or all of them, July 8. 1858.
 by a declaration to that effect. It is the fee of the estate that is conveyed,—
 the full fee, under certain restrictions, and if the entail says, I take off the
 limitations, was not that competent? I cannot conceive a doubt about that mat- Miller v.
Marsh.
 ter. But there is a second point put, which at the first view of it appears sound;
 that when you convert a tailzied fee into a fee-simple, you necessarily alter the
 destination, because the qualifying conditions are so constantly interfering
 with the rights of destination that the removal of these makes a different
 state of destination altogether. And if this was a new nomination of heirs, then
 the argument would come in, that this was done on death-bed. But I do not
 look on this as a new nomination of heirs. It is a retention of the old nomina-
 tion in express terms. The true meaning of this deed is, that the estate is
 to go free to parties named in the deed of nomination. It is a declaration to
 that effect; it is not a nomination. Now, is not that competent? If it be
 competent at all for a man to revoke fetters, and to say that the estate should
 still go to the same persons, and to say that the deed shall remain an entail
 to them, I cannot figure language more clear to do it than is done in this
 deed. His purpose is clear, that he does not mean a new nomination. I
 cannot adopt the reading that is given to this clause, nor the effect that is
 said to flow from a revocation of the fetters, and therefore I see no ground
 for altering the interlocutor of the Lord Ordinary.

LORD FULLERTON. I am of the same opinion: and I cannot help express-
 ing my satisfaction that your Lordship has given no countenance to the argu-
 ment for the heir-at-law, for it contains many principles dangerous to the best
 understood doctrines of the law of entail, and for which there is no authority,
 but the reverse. For the first proposition maintained was, that the last deed of
 nomination must be held to be a new conveyance, because there is an alteration
 from entail into fee-simple. I do not know where there is the slightest
 authority for that. It happens every day, contrary to the evident intention
 of the entailer, that fetters are held to be no longer binding. The title is a
 totally different thing from fetters, and may be quite good although the fetters
 are left out. I cannot see how, when the act of removing the fetters is the
 act of the entailer himself, why a conveyance free from fetters is not a per-
 fectly good conveyance, warranting a good title in fee-simple without fetters.
 The case of trust is perfectly different. As to the other point I have no diffi-
 culty. I have been accustomed to hold an alteration of the order of the suc-
 cession as being one thing, and the imposition of fetters as being quite dif-
 ferent. That runs through the whole system of our law; but according to
 the argument we have heard, that is quite wrong, and striking off fetters is an
 alteration of the order of succession. I cannot hold that. All that was done
 here was the withdrawing of fetters; but to hold that that is a new nomina-
 tion is out of the question altogether. On both points I concur with your
 Lordship.

LORD IVORY concurred.

LORD ROBERTSON. I entertain the same opinion. The question turns on
 the terms of the deed of 1829 and deed of nomination, and the effect of the
 death-bed deed. Now the destination is divided into three branches; *first*,
 the heirs of the truster's body; *second*, whom failing, the other heirs of tailzie

July 8. 1858.

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named by the deed of nomination; and *thirdly*, the heirs to be named or called to the succession in any deeds of nomination to be executed by him at any after time during his life. On the same day he executes what is plainly a deed of nomination and nothing else. Now I do not understand it to be disputed, that if the party had died leaving these deeds alone, that they were valid deeds to exclude the heir-at-law. Then under what does he come? No doubt it is competent for him to found on the deed executed in death-bed. But under what possible construction of this deed of 1848 is it to be called a deed of nomination? It is a deed of nomination that nominates nobody at all; or if it is a nomination, it re-nominates those nominated before. Is that a new deed of nomination? or is that the kind of deed of nomination contemplated under the three branches of the destination? It is a reiteration of the former deed of nomination. But it is said to contain a revocation. It does not so. It contains the word "revoke;" but what does it revoke? Nothing. Now, how can it be possibly maintained that that is a new deed of nomination with a revocation of the order of succession? It is a re-establishment of the order of succession, a re-naming of those already nominated; and all that is proposed to be done is to knock off fetters,—which does not alter the order of succession.

The Court "adhere to the interlocutor of Lord Wood, Ordinary, reclaimed against: further, on report of Lord Curriehill, Ordinary, the pursuer's counsel having stated, that in consequence of the refusal of the reclaiming note, No. . . . he had no wish to be farther heard on the points taken to report by Lord Curriehill, Repel the whole remaining reasons of reduction in the original summons and supplementary summons, in so far as the same are not repelled by the interlocutor of Lord Wood now adhered to: Sustain the defences, assilzie the defender from the whole conclusions of the original action, and of the supplementary action, and decern: Find the defender entitled to her expenses, &c."

John Cullen, W.S., Pursuer's Agent.

Dundas & Wilson, C.S., Defender's Agents.

(J. S. M.)

No. 241.

WALLACE & CO. v. M'NEILL.

Reparation—Master and Servant.—It was the rule in a certain coal-pit for the miners themselves to support the roofs of their respective rooms with wooden props, which props the master was bound to furnish. A miner having proceeded to work without propping up the roof of his room, owing to the want of props which the master had failed to supply on that day, and having been injured by the fall of the roof:—*Held*, that an action of damages at his instance against the master could not be maintained, the accident having been occasioned by the servant's own wilful neglect of duty, which the master's fault in not furnishing props could not excuse; and that the servant was entitled to have refused to work without props, and to have claimed his day's wages.

2d Division.

July 8. 1858.

Wallace & Co.
v. M'Neill.

This was an action raised in the Sheriff-Court of Lanarkshire, concluding for damages for the injury sustained by the pursuer M'Neill, through the culpable carelessness of Wallace & Co., the defenders. M'Neill was a miner employed in a colliery leased by the defenders. In 1851 he was injured, while at work in one of the rooms in the colliery by the fall of the roof; and for this injury he now sought compensation on the ground that the accident

had been occasioned by the defenders having neglected their duty in not July 8. 1873. causing the strata of the roofs of the rooms to be sufficiently propped up and supported, and in not providing a sufficiency of wood for the miners to make props (technically called "trees"), in order to sustain their rooms. Wallace & Co. averred in defence that it was the duty of the miners themselves to see to the support of their respective rooms, by inserting trees as they excavated the coal, which the pursuer had neglected to do; and that there was always an abundant supply of wood on the premises for forming such trees. They pleaded, that he could not sue for damages for what had been occasioned by his own fault. A proof was led, the result of which will be seen from the final interlocutor in the cause, which finds, "in point of fact, that it was the rule and practice of the colliery in which the pursuer was working that the colliers should duly prop and support the roof of their several rooms, in order to prevent injury to themselves or to the workings in the said mine; that such use and practice was fully known to the pursuer; and thus it was his duty so to prop and support the roof of the room in which he was directed to work, after the same had been opened a certain length by another collier, in order to prevent danger to himself and to the workings: Find that he was warned the day before the accident that it would be dangerous to proceed with the working of this room without propping the roof; and that, in the knowledge of such danger, he sought for props on that day, but could not find any: Find that the next day, without obtaining or asking for the same, if there were none at the pit-head, he proceeded to work further in his room without obtaining props for the roof, to his own manifest risk and danger." It was further proved, that the defenders always kept a plentiful supply of wood for trees at a depot distant from the pit about a quarter of a mile, and on the road leading to the pit from the colliers' houses; that it was the usual practice of the defenders to furnish wood from the depot to the colliers, by conveying it to the pit-head in the hutches, and leaving it there, so that the colliers might readily obtain it and cut it down to suit the sizes of their respective rooms; but that neither the night before, nor the morning of the accident, was there any supply of this wood to be found at the pit-head.

The Sheriff-substitute assoilzied the defenders, but the Sheriff-depute recalled this interlocutor; and, on the ground that the defenders had neglected to comply with the general custom of having a sufficient supply of wood for props at the pit-head, found them liable in damages, subject, however, to modification, in respect of the pursuer's own imprudent conduct.

Wallace & Co. advocated, for whom—

Logan, and Neaves, argued, that a distinction must be taken between such a case as the present and those where there has been a failure to perform a duty incumbent on the master alone, *e. g.*, the duty of maintaining sufficient working machinery. In the latter cases, the servant is entitled to rely on the safety of what it is his master's business to secure, and if he be injured while acting on such reliance, he will be entitled to reparation, even though his conduct has been imprudent and reckless. Here, on the other hand, the servant failed in the duty of supporting his room, a duty incumbent on *himself alone*; it is true his master had to do something to enable the servant to perform

July 8. 1858. *Wallace & Co. v. M'Neill.* that duty, but the master's failure to supply trees did not entitle the servant to go to work dangerously, and in breach of his own duty; he was not entitled to go and kill himself at his master's expense. He proceeded to work at his own risk; and therefore the present action is not relevant.

James Campbell, and H. Robertson, for M'Neill. It is proved to have been the invariable practice for the coal-master to supply wood for trees at the pit-head. This duty was neglected in the present instance, and the pursuer was injured from the want of trees. It is true the servant acted imprudently in risking his safety by continuing to work; but the master is bound to guard his workman against dangers attendant on their own rashness, and no imprudence on their part can excuse the master's neglect; *Dickson v. Rankin*, 31st Jan. 1852.

LORD JUSTICE-CLERK. This case involves an important principle, and it is very material that the grounds of our judgment should be correctly stated and generally known. The Court has, on many occasions, confirmed the principle, that it is the paramount duty of coal-masters, and persons engaged in similar undertakings, to provide, in every way, for the safety of the workmen in their employment, against the risks which such employment involves. And the Court has also held most justly, that such masters must, by their precautions and arrangements, protect their workmen, who are proverbially reckless, against the consequences of their own rashness and imprudence. But, on the other hand, we must take care that the law is not carried to such a length as to encourage workmen in their imprudent disregard of danger, when fully aware of it, and when it is their special duty to take the measures necessary to prevent it. The roofs of the rooms must be supported against the well known danger of stuff falling from them upon the workmen. It is the duty of both master and servants to prevent that danger, each by separate measures on their own parts respectively. The masters are bound to furnish the timber for props, and to place them at the pit mouth, ready for the workmen to cut up and use. This is clear in this case, and probably in all cases, without special bargain on the subject. It is no part of the service of the men to bring the props to the pit mouth, more than to obtain any other of the proper pit supplies. But it is the workmen themselves whose business and duty it is to fit and place the props to the roofs. If the props are not properly fitted and placed, or are cut by the men of insufficient length, the fault is solely that of the workman; and if the roof falls, it is the result of his own unskilfulness or want of attention. Thus the measures on which their safety depends are to be taken by themselves, and the case is not one in which they are using what is given to them by their masters (as ropes, machinery, &c.) as sufficient and complete for their protection, and which, without much inquiry, they go on using perhaps too long, being entitled to rely on the safety of doing so. On the occasion in question, the pursuer was warned of the necessity of propping the roof of his room. Besides, as a collier, he was bound to know of the risk, and he did know of it, for he made a search for props in leaving work the day before, but found none, and borrowed from another on the day of the accident a prop, which, however, was too short, and which he did not make sufficient by resting it on stones.

Next morning no props were to be obtained. I think that is fully proved. ^{July 8. 1853.} Even if that fact were doubtful, I should be willing to assume it in argument in favour of the pursuer in judging of the relevancy of his case, and of the soundness of the principle on which the masters are here held to be liable. ^{Wallace & Co. v. M'Neill.} Then, when no props were at the pit mouth, what was to be done? One of the workmen who had not himself that day wood for props, under the impression of that feeling of recklessness which the necessity of daily labour produces, when men are not fully informed of their relative rights, adds that he was "obliged to go on and work notwithstanding, or otherwise go home and starve." I wish it to be well understood by colliers, both for their own sakes, and for the true interests of their employers, that such is not the alternative, and that if the proper supplies for the safety of workmen are not furnished by the masters, and ready for the men, they being at the pit *ready to work*, are entitled to their day's wages, although they should not, as they ought not, attempt to work to their own danger. But they must wait a reasonable time for the wood, and distinctly apply to the proper party to get it, or intimate, that, if not got, they must leave the pit, or if such party is absent, (as on this occasion), they must send for the supply, if they know that there is any belonging to the coal-master at a convenient distance. Under such limitations to prevent pretexts being made to abstain from work, and yet claim wages, and taking the honest case which occurred here, that the further working in the room could not without props be carried further without imminent danger, and that no props were furnished by the master for the workmen, I apprehend it to be clear that, after requiring props and sending notice that they must be furnished, the workmen are not only entitled, but bound to abstain from incurring danger, and are entitled to their day's wages, for it is the fault of the master alone, which in such a case, leads to the expected return not being made in the output of coal. They are in attendance ready to work in fulfilment of their part of the contract. But the master has failed to give them, as bound, the means essentially necessary to enable them to work with safety. Hence they can claim the wages due to them for the period for which they are bound to give their labour, for there is no fault on their part. It is very important that this should be understood to be the law of such a case, (of course I exclude abuse), for then the colliers will be led steadily and quietly to refuse to work when there is danger, until they have the means of preventing the danger; and the masters and their managers will thus be led to attend much more pointedly to the supply and examination of the adequate and suitable materials for ensuring the safety of the men while working. I have said this is a case in which the *men themselves* were the only parties to take the measures necessary for their own safety, the materials being furnished by the masters. Hence it cannot be quoted as leading to the result, that in the ordinary circumstances which occur, the masters, if they have neglected *their* duty of providing for the safety of the workmen—have used too long insufficient machinery—or have not had their mines examined against fire-damp, and so forth—are relieved from liability for damages, merely because the men have been, as they are known always to be, rash, imprudent, and reckless. Quite the reverse; here the pursuer ran into "a seen danger," when his duty, even to his employer, was not to

July 8. 1853. work. Judgment must therefore go for the advocates, but without expenses.

Wallace & Co. v. M'Neill. LORD COCKBURN. I agree in all points except one, which, however, I consider not so material as to affect the result to which your Lordship has come. It was the duty of the workman to protect his room by keeping up the roof, and he was warned eighteen hours before the accident, of the risk he was incurring by neglecting this duty. I think it is the fair result of the proof that the master did not commit any failure in duty in not maintaining a supply of "trees" at the pit mouth, for there were lots at the depot, which was close to M'Neill's house, and he was not entitled, in my opinion, to demand as matter of right, that they should be laid down for him at the pit mouth. If we had to go on this alone, I would hold the man wrong, and the master right. But this point is not of consequence, for the strong ground against M'Neill's claim is this, that even assuming the master to have failed in duty in not having wood at the pit mouth, still the man instead of refusing to work, says, with extraordinary rashness, I will work on, and you shall be liable to me in damages if I get hurt. But he had no right to go on to work; he was bound to have abstained. Nor is he to go home and starve. On the contrary, he is to go home and earn his wages without any work at all; for there is no Judge who would not hold him entitled to his wages in such circumstances as the present.

LORDS MURRAY and WOOD were of opinion, that, even assuming a failure in duty on the part of the master in not supplying wood at the pit mouth, still there was such a failure in duty on the part of the man in working on to the hazard of his life, as barred him from insisting for damages.

The COURT accordingly, pronounced an interlocutor advocating the cause, and containing the findings already quoted. It then proceeded, "Find that his duty was not to work where it was thus dangerous to do so, but to ask for and obtain props for the support of the roof, if there were none at the pit-head, and that if none were obtained and supplied to him, that he being ready to fulfil his engagement, but entitled and bound not to work with danger to himself at the workings, would have been entitled to his day's wages: Find, therefore, in point of law, that the pursuer in this state of the facts, is not entitled to claim damages in respect of the fall of the roof, which he thus failed to support, and by which he was injured, from the coal-masters, merely because the supply of wood was not furnished to him on the morning of that day: Therefore assoilzie the defenders from the conclusions of the libel, and decern: But find no expenses due to either of the parties."

James Peddie, W.S., Advocate's Agent.

C. and C. Fisher, S.S.C., Respondents' Agents.

(J. M. M.)

No. 242.

PETITION, WILLIAM HALCOMB.

Murriage-Contract—Trust—Judicial Factor.—Circumstances in which the Court superseded trustees under a marriage-contract, and appointed a judicial factor for the administration of the trust.

1st Division.

July 9. 1853.

Petition, Halcomb.

This was an application for the appointment of a judicial factor in room of the petitioner and other trustees nominated in a marriage-contract between the late Thomas Thoms and Miss Gilbert. The trustees named were the petitioner, certain brothers of Mr Thoms, and Miss Gilbert's brother, now resi-

dent in New Zealand. The marriage-contract provided for payment of an annuity of £200 to Miss Gilbert from the day of the marriage, and, in case she should survive her husband, for payment of £3000 to the marriage trustees at the first term after his death, the interest of which was to be applied, *pro tanto*, towards payment of the annuity, and the capital to be held by them for the purposes therein mentioned. The heirs and representatives of Mr Thoms were to be liable for the balance of the annuity. The petition set forth, that Mr Thoms and his wife left this country for New Zealand in 1842; that he died there in 1845, was then insolvent; that he was survived by Mrs Thoms and an infant son, by neither of whom is he represented; that the petitioner and Mr Gilbert accepted of the office of trustees; that no payment has been made to the trustees or the widow on account of the annuity, and that the £3000 remains unpaid; that at his death Mr Thoms was entitled to a share of valuable properties in Scotland belonging to himself and his brothers jointly, under a trust-deed executed in favour of themselves for the purpose of selling the lands and paying the debts due by the trusters and dividing the residue amongst them in equal shares. That the petitioner had made application to the trustees under that deed—being also trustees nominated under the marriage-contract—for an account of their intromissions, but unsuccessfully, and that having intimated their acceptance of the office of trustees under the marriage-contract, the petitioner was thus unable to take measures to enforce fulfilment of the obligation under the marriage-contract, his co-trustees being the parties who fall to account, and they having declined to do so. In the circumstances, therefore, the petitioner prayed to have the administration of the marriage-trust placed in the hands of a judicial factor.

Answers were lodged for the Thoms, stating that a sum supposed to be equal to his eventual share in the residue of the joint estate had been paid to their brother before he went to New Zealand. The trust could not advantageously be brought to a close at present, but they professed themselves most anxious that the petitioner should have the amplest opportunity of performing whatever duties he might consider necessary to be discharged in order to promote the interests or secure the rights of the trust estate; and they entered into detailed explanation to shew that their conduct had not been actuated by improper or unworthy motives.

But the Court, in the whole circumstances, and seeing that no account of the management of the joint property had been furnished, superseded the management of the trust under the marriage-contract, and appointed a judicial factor as craved for.

Mackay & Howe, W.S., Petitioner's Agents.

Lockhart, Morton, Whitehead, and Greig, W.S., Respondent's Agents. (J. S. M.)

BUCHANAN'S TRUSTEES *v.* MONTGOMERIE AND FLEMING. No. 243.

Running stream—Drainage—Inferior heritor.—A proprietor of land erected dwelling-houses thereon, which he supplied artificially with water, and the sewerage of which he conducted by pipes and otherwise to a small running stream. The stream was thereby polluted and rendered unfit for the use of cattle and for domestic purposes to which it had been applied by an inferior heritor:—*Held*, that the pollution being created by artificial means, such use of the stream was not sanctioned by any doctrine of law; and that the inferior heritor was therefore entitled to interdict the continuance of its use for drainage purposes.

1st Division.
July 9, 1853.

Buchanan's
Trustees v.
Montgomerie
and Fleming.

This was an advocacy from the Sheriff-Court of Lanarkshire, and the facts of the case as established by proof were as follows:—The pursuers, Buchanan's trustees, were trust proprietors of the lands and estate of Dowanhill, which, with the exception of the ground taken up by the mansion-house, garden, offices, and ornamental plantations, were occupied for pastoral and agricultural purposes. The defenders, Montgomerie and Fleming, were proprietors of the lands and estate of Kelvinside, which in part bound the pursuer's lands. They had laid out a considerable portion of their lands for feuing and building purposes, and a number of houses were built thereon, and other houses and tenements in progress of being erected. Water was introduced into these houses by pipes from the Glasgow Water Company's works, and a common sewer had been constructed by the defenders, whereby the waste or sewerage-water was carried off from the buildings, and discharged into a covered tile drain, and afterwards into an open cut or course, and so led into a small run of water or streamlet which flowed through the pursuer's lands of Dowanhill. It was only by an artificial alteration of the levels of the land through which the waste or sewerage-water was brought that it was carried in that direction; left to itself, the water would find its way first into the lands of Hillhead, and would afterwards be discharged on the lands of Dowanhill. Previous to the sewerage-water being led into the run or streamlet, the water therein was sufficiently pure to be suitable for domestic purposes and the use of cattle, but since the introduction of the sewerage-water, the water in the run or streamlet had become so adulterated and vitiated as to be unfit for domestic purposes or for cattle.

In these circumstances the pursuers presented an application to the Sheriff to have the defenders interdicted from discharging upon the pursuers' lands the water and sewerage-water from the houses erected by the defenders.

A record was made up and the interdict granted. The defenders advocated the cause.

P. Fraser, and *Neaves*, for the advocates. The obligations between inferior and superior heritors entitle the advocates to such a passage for the water, which, in the legitimate use of their property, is accumulated there, E. 2, 9, 2. The primary use of land is for the habitation of man. Inferior lands are subject to the burden of carrying off the sewage arising from such use, and water-courses are the provisions which nature has supplied for that purpose; *Downie v. Earl of Moray*, 12th November 1825. For more than forty years the pursuer's lands have been subject to the burden of passing the sewage of a farm-house on the advocate's property, and the prescription applies to all houses to be erected thereon.

Young, and the *Dean of Faculty*, for the respondents. So far as the surface water is concerned the inferior heritor is bound to receive it. But a streamlet cannot be converted into a common sewer; *Dunn v. Hamilton*, 11th March 1837, 15 S. 853; *Magistrates of Inverness*, M. 13,191, E. (Ivory's Ed.) 219, B 2, t. 1, § 2. (note.) There is no such burden known to law imposed on lower ground in favour of higher that it must receive not only the surface water, which by its natural fall flows into that land, but all the pollution that may be created. All the doctrine beyond this is applicable to a

running stream ; and even supposing this streamlet to be a *running stream*, its July 9. 1853. size is conclusive against the use to which it is proposed to apply it.

The LORD PRESIDENT. The evidence establishes that the water was formerly fit for the use of cattle and domestic purposes, and that by the introduction of sewerage-water its utility is affected, the quality deteriorated, and the streamlet destroyed for the purposes to which it was formerly applied. If the operations go on, the amount of the nuisance may be expected to be greater. In that state of matters the question arises, whether, notwithstanding these are the results of the advocator's operations, they are not entitled so to make use of a running stream? It is said that they are turning their property to a legitimate purpose, and that the water so introduced into the houses is in a legitimate use of the property, and is for the highest purposes of human comfort. I do not think that the use of the stream complained of can be said to be one of the primary purposes of a running stream. It may be an important use of the property for the defenders to have human dwellings on it; but to alter the character of the water in the stream so as to make it unfit for the purposes of water is another matter, and I cannot help thinking that the whole of the authorities and decisions are in one direction. This stream is not of the nature of a public river. A public river is capable of various meanings, and the dexterous use of the term is apt to mislead in cases of this kind. It is thought that by the aid of the word *public* it gives parties a right to use or abuse it as they choose. But this is certainly not in the category of a public river, and it cannot be polluted under the plea that it is so. The defenders plead that they will be deprived of the use of the land for erecting buildings for the inhabitants, by excluding them from carrying their sewerage-water to the stream. I cannot listen to that argument. It is a limitation of the use of their lands undoubtedly. It happens unfortunately for them that their property is what they cannot turn to that use without getting authority by purchase or otherwise. But it does not follow that when a party chooses to turn his property to what he considers to be the most beneficial use of it, viz., the erection of dwelling-houses, that it entitles him to inundate his neighbour's property with polluted water. Then there are general doctrines that an inferior heritor is subject entirely to the burden of receiving water from the upper tenement adjacent to it. That is undoubtedly so; and it is laid down that a party may drain his moss, and that the inferior heritor must receive the water so drained by him. That is a doctrine to be received with considerable qualification. But it has no application to the present case, which is not a case of letting water fall down on a neighbour's land, but proceeds on the statement that the party has introduced into his tenement an artificial supply of water, and having brought it into his tenement, seeks to pass it on to his neighbour, after he has had the use of it and has polluted it. That is a totally different case, and involves a totally different doctrine from that of an inferior heritor being bound to receive the water of a superior tenement. That doctrine does not go to this, that a party is bound to receive water in a torrent with all the pollution that may be put in it. Now here it may be that the party is entitled to put the pollution on his own lands, and it is possible that part of it might be washed down by the rains into the neighbour-

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ing lands or into the stream. But it is very obvious that if it were put on his own lands in that way it would undergo considerable purification by percolation and evaporation and other natural causes before it reached those lands or the stream. That is a very different thing from sending it down in this way, and at any rate it would not go into this stream, for it is matter of fact that it is only by artificial means that it is conducted to it, and therefore I think this is altogether an artificial operation by which the pollution is created and directed into the stream. Therefore I come to the conclusion that the interdict of the Sheriff-substitute is substantially a true result of the case.

LORD IVORY. I am entirely of the same opinion. There is here no servitude by grant or prescription. Nature has not been left here to do her own work, and man has interfered to make this *opus manufactum*. He has contributed to make this nuisance, and that has taken it out of the legal servitude, arising out of the natural locality of the subject.

LORDS FULLERTON and ROBERTSON concurred.

The COURT pronounced an interlocutor containing various findings in point of fact, and "Find in point of law that whatever right the defenders might have to lead into the said run or streamlet the ordinary surface water arising on their lands, they have no right to discharge therein sewerage-water, being a portion of the water introduced artificially into their lands, and after the same has been rendered noxious by intermixture with the refuse, filth, and soil of inhabited houses: Therefore grant interdict as craved against the defenders discharging, or permitting to be discharged upon the pursuer's lands, the sewerage or waste water from the houses and tenements erected on their lands of Kelvinside: Find the defenders liable in expenses both in this Court and in the Inferior Court," &c.

Andrew Howden, W.S., Advocators' Agent.

Webster & Rennie, W.S., Respondents' Agents.

(J. S. M.)

No. 244.

REID AND OTHERS v. BETHUNE.

Expenses, taxing of—Fees to Counsel.—Fee to the counsel of a claimant in a multiplepounding raised by trustees, to attend the calling of the case in the weekly rolls, *disallowed*.

Fee to the counsel of the respondent to attend the moving of the reclaiming note in the single bills, *allowed*.

2d Division.

See report of this multiplepounding, of date 8th June last.

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In taxing the account of expenses of Thomson, one of the successful claimants, the Auditor disallowed the following fees to counsel:—A fee of £1, 1s. to attend the calling in the weekly roll; and a fee of £1, 1s. to attend the moving of the reclaiming note in the single bills. Thomson now objected to the report, in so far as these charges were disallowed.

The COURT repelled the first objection; but sustained the second objection, and allowed the fee, holding that it was quite proper that the respondent's counsel should examine the reclaiming note to see that it was correct, and attend the moving in the single bills.

Murray & Ferrier, W.S.

Dundas & Wilson, C.S.

(J. M. M.)

THORBURN v. MARTIN AND OTHERS.

No. 245.

Pactum illicitum—Sale—Partnership—Homologation—Void or Voidable—Title to Sue.—Held, 1. That an individual partner of a company has, as such, a right to reduce a sale of bad debts due to the company, made at a public auction to a person who, as director and law agent of the company, stood in a confidential position in regard to it; and that this right of challenge does not depend upon any pecuniary interest or injury. 2. That, in the circumstances, there was no homologation or adoption by the company of such illegal sale, supposing it to be merely voidable and not void. 3. *Opinion,* That the adoption by a majority of the partners of such an illegal sale cannot validate it, as against those partners who have not directly assented to it.

“The Southern Bank of Scotland” was established in 1838. The pursuer, 2d Division. Thorburn, became holder of fifty shares in it; and he still remains a partner July 9. 1853. to that extent. He was also one of the directors. In 1842 the bank brought its operations to a close; and, at a general meeting of the partners held in Jan. 1843, the defender, M'Culloch, was appointed to wind up its affairs in terms of the contract of copartnership, the existing directors being at the same time appointed a committee to advise with and direct him in his proceedings. He accepted and acted till 1847, when he resigned; and subsequently a judicial factor was appointed to take charge of the affairs of the bank, who still holds that office. Thorburn v. Martin, &c.

Both the pursuer and the defender Kemp were members of the committee of direction; but the pursuer never attended any of its meetings, or interfered in any way with it; Kemp, however, took an active and prominent part in its proceedings, and thus became acquainted with the reports made to it by M'Culloch, in relation to the debts due to the bank. He also acted as law-agent of the committee; and was employed by it as messenger-at-arms in the various steps taken from time to time to enforce payment of outstanding obligations.

In the course of the proceedings of M'Culloch and the committee, the expediency of selling the doubtful debts due to the bank was brought before them, and after much deliberation, a sale was resolved upon. Lists of these debts were ordered to be prepared, and advertisements to be made, intimating where these lists were to be seen. They were accordingly prepared by Kemp, and exposed to public view along with the articles of roup. After due advertisement, a public auction took place on 23d Sept. 1846, when the debts contained in lots 1 and 2 were purchased by the defender Kemp. The sale was reported to the committee. Thereafter M'Culloch, by directions of the committee, prepared and circulated among all the partners of the bank a printed report on the company's affairs, in which the sale was alluded to; and this report was approved of by a general meeting of the partners, duly called by circular, in terms of the 8th clause of the contract of copartnership, which provides, that the acts of a majority of the partners and their proxies present at such meeting shall be binding on the whole partners.

Kemp assigned the debts which he thus purchased from the bank, to his clerk, Martin, also a defender in this action. In lot 1st there was contained one, said to be due by the pursuer; and for payment of this Martin raised an action against him in the Sheriff-Court. In defence, Thorburn not only alleged that any debt due by him to the bank had long ago been extinguished

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by compensation, but objected to the validity of the transactions upon which Martin founded his claim. He also raised the present action of reduction of the articles of roup of the debts, minute of sale, &c., and also of the assignation by Kemp to Martin, calling as defenders, Martin, Kemp, and M'Culloch.* The third reason of reduction was founded on the confidential relations in which Kemp stood to the bank and committee of direction, by means of which he "acquired minute confidential information in regard to the affairs of the said bank, and the outstanding claims of debt, and other obligations belonging or due to the said bank, and was otherwise in such a position, in reference to the said bank, that it was altogether illegal in him to purchase or acquire the said outstanding claims of debt," &c.

The chief pleas maintained in defence were,—That in the circumstances there was nothing illegal in the sale: That if there was, it was a voidable and not a void transaction, and as it had been sanctioned by the committee, and approved of and homologated by a general meeting of the company, and also acquiesced in by the whole partners, and the prices of the debts sold received without objection, it could not now be set aside at the instance of an individual partner: That a partner had no title to sue alone without the company's concurrence.

The case was reported by the Lord Ordinary.

Pattison, and *G. G. Bell*, for pursuer.

Maidment, and *Pyper*, for Martin and Kemp.

LORD JUSTICE-CLERK. I think Martin, the clerk of Kemp, the law-agent who acted for the company in all their matters, is to be viewed in the same light as Kemp. Indeed, as no price is mentioned in the assignation to Martin as paid by him to his master, Kemp, I take him as only a cover for Kemp carrying on the action. Then, what is the case against Kemp and Martin? Kemp was one of the directors entrusted by the company with the duty of making the most of their assets, which they thus employed him to aid in recovering. This was most confidential employment—confidence reposed in him of the most serious character. Then he was also the paid law-agent and adviser of the company. In both characters he considered and investigated and reported upon the state of all the debts supposed to be bad, and upon the circumstances of the debtors. And, as law-agent, he had peculiar means of investigation, and of obtaining private information as to these matters. He has charged for such inquiries; and it is proved that he did in that character make full inquiries. The lists were prepared by him, and were in his hands for intending purchasers to make their inquiries at him. His interest, if he intended to purchase, was thus to deter others from coming forward to purchase, and to represent the debts as worth nothing, in order to make the most of them. His interest was to mislead the manager and the directors, since he was to act in a way incompatible with his confidential employment. I hold his purchase of the debts to be clearly illegal, and a very bad case of the kind. Martin knew of

* M'Culloch was called in respect of another reason of reduction than the one bearing on this report, viz., that the sale by him was *ultra vires*. From the conclusions of the action against him on that ground he was absolved.

the objections to Kemp's purchase, and has no separate case. It is quite clear, that the fact that Kemp bought, was never made known in any way to the partners. And there is not a particle of evidence that the pursuer knew that Kemp had bought until he was prosecuted by Martin, as assignee of Kemp, for payment of the debt said to be due by him to the bank. And the defence now maintained in support of the sale is, that the pursuer cannot challenge it. This is a very peculiar and unfavourable case for Kemp to state, and there is no foundation for any such plea in bar of the challenge. I need not consider, whether, if the pursuer had been a partner only, and not a debtor of the company in one of the debts purchased—or whether, if he had been merely a debtor, and not a partner—he could have challenged this sale. I shall only say, that it will be difficult to satisfy me that any partner in such circumstances, when the illegal character of such a purchase by his trustee and law-agent, which had been concealed from him at the time, is discovered, is not entitled to object to that party being in right of the company funds so acquired, and is not entitled to insist upon the property being re-sold. But both characters are in the pursuer. This fact, that he is prosecuted by Kemp, or his tool Martin, for payment of the debt so purchased, gives him, in my opinion, an incontestable right to challenge the purchase by Kemp, and the right, therefore, to prosecute him, he being a partner of the company. I think the ground of challenge so grave, and the right and interest of a partner in such a case so paramount to all other considerations, that I cannot allow any technical difficulties, if there were any, to bar the pursuer's right to challenge this purchase. But what are the objections stated against his right to challenge? The approval of the partners at a general meeting of the bad debts generally having been sold comes to nothing, for this breach of trust by Kemp was not disclosed to them. The notice in the report, of the debts having been sold, is very slight and incidental. No special notice of that matter is taken in the minute, which merely bears a general approval of the report. But of Kemp being purchaser, not one hint is given. Then it was said the pursuer had no interest, because he must pay his debt to some one, and Kemp's discharge would be good. But to that I answer, that the right of a partner to object to such an illegal act, not disclosed to the partners, and which act is in direct breach of trust committed to the director and law-agent, is not to be decided by, nor depends upon, the result of pecuniary interest and injury. The title, however, to challenge, is on a much higher right and interest, viz., that of checking fraud, and of refusing to allow any transfer of the property of the company to, or any acquisition thereof by, a director and law-agent, through fraud and illegal breach of trust. A partner has a clear title to set aside such a transaction, whether he can shew pecuniary loss or not. I should also say that the pursuer, a partner who says he has a counter-claim against the company for expense in inquiries and journeys undertaken at the desire of his brother-directors, is entitled to object to this purchase, just because he wishes such claim to be considered by his brother-directors rather than by one who bought the debt in direct breach of trust. Neither do I think he was bound to call the company, or all the partners, or the present manager. He finds that this illegal purchase is made the ground of action against himself. He proceeds, therefore, to challenge it, and calls the only

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party who comes in contact with him. If the other partners choose to interfere, they may; but no existing act of theirs as to this particular purchase can be pleaded against the pursuer, assuming that any such act would be any objection to his action. The company have done nothing on which the defenders can found. Whether the partners might, when aware of the purchase, ratify and validate it *against the pursuer*, so as to bar challenge, I need not at present inquire, for that is not yet done. The pursuer is thus entitled to judgment, and I must add, that I conceive his right as a partner would overcome far more serious technical objections than any here stated.

LORD COCKBURN. I think the legal consequences of a trustee buying a claim due to the trust is only that the transaction is voidable, not that it is void. Consequently, if the company goes—and I think they have—into such a transaction as this, and chooses to keep the trustee to his bargain, they are quite entitled to do so, and he remains the lawful buyer. But further, it is to be observed, that no company has been called, or judicial factor, nor are there any conclusions against them. I hold, on the facts of the case, that the shareholders not only did not challenge the transactions at the time, but they have not even come forward now, and the facts disclosed prove that they approved of the transaction. By that approval, Thorburn, as one of the shareholders, is bound. It is said that the shareholders were not informed of the criminal conduct of their own agent, and certainly the grounds of their approval are not specified. But still they did approve, and the bare approval is enough. I think it is a fatal defect that the company was not even called. However voidable the transaction may be by the conduct of Kemp, Thorburn is not entitled to avail himself of that unaided by the company.

LORD MURRAY. I agree with the chair. In regard to the *instance*,—where a thing is so clearly unlawful as this is, I hold the majority has no power to control the minority. The majority cannot go against the law. If all parties approved of the transaction there could be no question, for no one would be injured; but if there is a single shareholder who does not agree, he is entitled to come here and challenge the unlawful act, though it was approbated by all his brother-shareholders.

LORD WOOD. I am of opinion that the sale in question ought to be reduced. When Kemp's position in relation to the bank and its affairs, and in particular, in reference to these bad debts and the sale of them, is attended to, there manifestly can be no doubt of its illegality. It was not, and could not have been successfully contended, that, in the circumstances, it made any difference in the case that the debts purchased by Kemp had ceased to belong to him, his right having been transferred to the defender Martin. I take Martin and Kemp to be one and the same. But it was said, that illegal though the sale be, the pursuer has no title or interest, or rather, was *barred* from insisting in a reduction of it, and, consequently, of the assignation in favour of Martin. It may be that a sale such as the one in question, is not absolutely void in this sense, that it may be taken out of the reach of challenge by the direct confirmation of the party interested to object to it, or by homologation or acquiescence and lapse of time, which shall be held equivalent to direct confirmation. Now, without contesting this, it appears to me that the defenders' plea cannot be sustained. It is needless to enlarge upon the prin-

ciple and views of policy upon which the illegality of purchases made by parties July 9. 1853.
in certain relations of confidence, rest. The rule is a most salutary one; and
when in any case the illegality of the purchase is indisputable, it is the duty Thorburn v.
of a court of law to be careful that its enforcement shall not be excluded Martin, &c.
except on broad and clear grounds, otherwise the usefulness of the rule as a
preventitive to such purchases would be greatly impaired. The reduction of
this sale may have had its origin in the suit against the pursuer; and that he
should have been thereby moved to it, is not unreasonable, seeing that he not
only disputed the debt, but stated that he had counter-claims. Now that, as
a partner of the company, he has a title to insist for reduction of an illegal
sale of a part of the company's property, appears to me to be perfectly clear,
and the more so, seeing that he was an alleged debtor of the company, and
was sued as such by the purchaser of the bad debts. I further think, that, in
the circumstances, he has called the proper parties as defenders—Martin, the
assignee of Kemp, Kemp himself the purchaser, and M'Culloch, the manager
appointed in January 1843 for winding up the affairs of the bank, and who
may be said to have been the seller. There being, then, no objection to what
is properly the title to insist, the ground of objection to the action truly is,
that the pursuer is barred from following it out in respect of his own conduct,
or that of the Southern Bank, of which he is a partner, in relation to the sale
which is challenged. That the company was aware that the bad debts were
to be sold, and sanctioned the sale, is certain; and also, that it knew a sale
had taken place, and approved of it. But of the company having known that
any part of the bad debts had been sold to Kemp, I do not find a vestige of
evidence. It cannot be held to have known that the sale was an illegal one to
a party who by law was incapacitated from purchasing; and I think it free from
doubt, that in all that took place, there was nothing which could infer an ap-
proval of or acquiescence in the sale to Kemp which could have excluded the
company from reducing the sale. But it is obvious, that if, by the information
afforded to the company as a body, and the proceedings thereon, no knowledge
is brought home to it, which would have barred a challenge at the company's
instance, no greater knowledge of the facts could have been communicated to
the pursuer, who was not present at any of the meetings, by the circulation
and receipt of M'Culloch's report, and the resolution of the partners. We
have not, therefore, here to deal with the case of a reduction at the instance
of an individual partner, or an illegal sale, which, although not approved of
by him *personally*, had been confirmed by the company,—but a reduction at
the instance of a partner of an illegal sale, which there is no evidence what-
ever of the company having confirmed, and which, consequently, the company
itself is *in titulo* to challenge, if it thought proper. And in that state of the
case, I apprehend that there is no ground for any solid objection to the pur-
suer, as a partner of the company, being allowed to insist in an action of
reduction at his own instance. But were it necessary for the disposal of the
case, I cannot say that I should hesitate in going a step further, and holding,
that however much a confirmation of an illegal sale by the company, of a part
of the company property, might bind the partners directly assenting to it, it
could not have that effect against an absent partner, so as to take away his
right to reduce it. Such an act on the part of a company is not one of those

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which, by the pleasure of the majority of the partners at a meeting, or by their united votes, can be made obligatory on the rest of the partners. It is plain, that if it could, the most serious injury might be done to others by a certain portion of the partners, without any improper negligence on the part of the others, who were entitled to rely that such an illegal proceeding would never be sanctioned. At the least, to enable the resolution of a meeting in reference to it, to be of force against absent partners, it would require that special notice should be given, which was not done here.

The COURT "sustain the third reason of reduction against the defenders Kemp and Martin: Find that the said Robert Kemp was not entitled to purchase the debts included in that reason of reduction, by reason of the relation in which he stood to the banking company and its shareholders; and that the said William Martin, his clerk, at the time was aware of the said relation of the said Robert Kemp to the said bank and its shareholders, and was himself liable to a similar objection: Find that the pursuer, a shareholder of the said bank and said also to be a debtor thereto, being prosecuted for payment of such alleged debt so bought by Kemp in breach of the trust reposed in him, is entitled to challenge the said purchase, and to object to the transfer of the debt by means of the said illegal purchase: Find that no valid objection has been stated against his right to challenge such an illegal purchase: Therefore, reduce, decern, and declare, in terms of the conclusions of the summons, so far as regards the purchase of the debts by Martin from Kemp, lots one and two: Find the defenders Kemp and Martin liable to the pursuer in expenses," &c.

William Mason, S.S.C., Pursuer's Agent.

R. Arthur, S.S.C., Agent for Martin and Kemp.

(J. M. M.)

No. 246.

CAMERON v. MACKENZIE.

Process—Charge—Suspension—Amendment.—A pursuer in an action having taken decree in absence against one of the defenders, and charged him upon the extracted decree, a suspension of this charge was presented, but without caution or consignation:—*Held* competent to amend the note to the effect of offering consignation.

1st Division.

July 12. 1853.

Cameron v.
Mackenzie.

Mackenzie having been summarily ejected from premises occupied by him as an inn in Ross-shire, and conceiving the proceedings to have been irregular and illegal, and himself injured thereby, brought an action of damages against his landlord, the Sheriff-officer, and Cameron as cautioner for the Sheriff-officer, concluding against them conjunctly and severally, for payment to him of £300 sterling, as alleged damages to his credit and property, and *solatium* to his injured feelings. The summons was served on all the defenders, and when called was taken out to see. Defences were lodged for the landlord and Sheriff-officer, but not for Cameron. Against Cameron, the pursuer obtained decree in absence with expenses. (See *ante*, p. 40.) This decree was extracted, and Cameron charged thereon. Of that charge, Cameron brought a suspension, on the ground *inter alia*, that the action in which the decree in absence charged upon was obtained being defended by the party for whom the complainer was merely cautioner as well as by that party's employer, it was irregular and incompetent to ask or take decree in absence against him as

cautioner, and this the more especially, when the matter sued for was a ran-^{July 12. 1853.} dom claim of damages; and having regard to these circumstances, and to the terms of the bond of caution, which was of a limited nature, he pleaded that ^{Cameron v.} Mackenzie. the note of suspension ought to be passed without caution or consignment.

The charger objected that the decree and charge were perfectly regular and competent, and the complainer therefore could only be reponed in the form and manner provided by the 1 and 2 Vict. c. 86, §§ 4 and 5.

The Lord Ordinary (Curriehill), was of opinion that the reasons appended to the note might be good defences, but that in order to get into them, the suspender must consign. He therefore, "before further answer, allows the complainer to amend his note, to the effect of offering consignment, in terms of the Act 1 and 2 Vict. c. 86, § 5, if so advised." And on the suspender offering consignment, he "passes the note."

Against these interlocutors the charger reclaimed, for whom—

Monro. It is incompetent to amend the note, which is altogether wrong in form, and ought to have been at first refused. None of the pleas in law found on the fact that there was decree in absence. Consignment will not correct what is altogether wrong under the statute. It ought therefore to have been refused with expenses.

Mackintosh, for the respondent, was not called on.

The LORD PRESIDENT. We are called on to consider two things which are not before us,—viz., whether the note ought to have been refused when first presented, and whether it ought to have been refused with expenses, whereas, what is before us is an interlocutor allowing consignment and passing the note. Now, if we were obliged to go into the merits, I think the Lord Ordinary was fastidious in not passing the note at first. But he thought it might be well to bring it under the statute, so far at least as to have consignment. I do not remember of any objection of this kind having ever been taken; and see no reason to disturb the interlocutor of the Lord Ordinary.

The rest of the Court concurred.

Objection repelled and note refused.

A. Pearson Scotland, S.S.C., Agent for Charger and Reclaimer.

L. Mackintosh, S.S.C., Suspender's Agent. (J. S. M.)

GREAT NORTHERN RAILWAY COMPANY v. INGLIS.

No. 247.

Process—Expenses—Jury Trial—Bill of Exception.

See ante, p. 293.

This case now came before the Court on the Auditor's report.

Sandford, for the defender, objected, that having obtained a verdict in the 1st Division. first trial, he ought not in the circumstances of this case, to be held liable for July 12. 1853. the expense of it. The pursuers got a second trial on one only out of five exceptions—and which was taken to a direction in point of law on the part of ^{G. N. Rail Co.} the presiding Judge. That exception was sustained, but it was on a technical ^{v. Inglis.} point of comparatively trivial importance, and had the law stood as it now does under the recent Court of Session Act, the verdict would not have been affected by the result of this exception. It was the only one allowed. Of the

July 12. 1853. others, three were not insisted on, and the fourth was not granted either. It was impossible in any view for the pursuers to have succeeded in the shape in which they presented their case to the Jury.

G. N. Rail. Co.
v. Inglis.

The *Dean of Faculty, contra*. The Court cannot speculate on what might have been the result. The point does not arise.

The LORD PRESIDENT. The general rule in our law is, that expenses follow success in the case. In regard to a verdict set aside on a bill of exceptions, there is no deviation from the general rule. There may be an exception to that rule; and if the case had come up to the point put by the defender it might have raised a serious question. But it does not arise. In order to make out his case, he should have shewn that the fourth exception was a bad one. There is no ground for holding that. The Court was equally divided, and it was not held necessary to decide it nor any of the others, for there was another exception which was held good. We are in the position that we cannot hold that the verdict would have been for the defender.

The other Judges concurred.

Objection repelled.

Gibson-Craig, Dalziel, & Brodie, W.S., Pursuers' Agents.

Inglis & Leslie, W.S., Defender's Agents.

(J. S. M.)

No. 248.

STEWART v. THE MAGISTRATES OF GREENOCK AND OTHERS.

Burgh of Barony—Municipal Election—Challenge—16 Geo. II., cap. 11, § 24.—Held that a burgh of barony which returns a member of parliament, not by its magistrates and town-council, but by its qualified electors, is not affected by the provisions of the 16 Geo. II., cap. 11, and therefore that the proceedings at a municipal election may be competently challenged, although after a period of two calendar months from the date of the proceedings complained of.

1st Division. This was a reduction at the instance of one of the burgesses of Greenock of the election of provost, on the ground of irregularity in the proceedings.

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The defender John Martin was elected a councillor in November 1849. His term of office therefore expired on the first Tuesday of November 1852. During the period of his office he had been appointed provost *ad interim*. As provost he granted a commission dated 1st November 1852, being previous to the day of election, to a writer in Greenock to officiate as his substitute at the election of councillors, fixed by the 3d and 4th Wm. IV. c. 77, to take place on the first Tuesday of that month. The election took place on that commission, and the defender Martin was re-elected a councillor and afterwards provost. The whole proceedings were now sought to be reduced, in respect they do not contain the true *res gesta*: and it was pleaded that the defender Martin having ceased to be provost before the election on the first Tuesday of November, was not entitled, by himself or any substitute to preside at that election, and that the commission granted was therefore illegal and invalid.

Preliminary defences were lodged, pleading that by the 16 Geo. II. cap. 11, § 24, it is enacted that any such complaint as the present, of wrong done in the election of magistrates, shall be presented within two calendar months after such election. The present action was not brought till after that period had elapsed, the summons being signeted on 8th January 1853; therefore,

(1). The action is not now competent; and, (2). The pursuer having recognised, acted upon, and homologated the commission, he is barred *personali exceptione* from reducing the same, and he has in no view any sufficient title or interest to insist in this action; and, (3). The action is in the circumstances neither timeously nor competently brought, and will fall to be dismissed with expenses.

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The Lord Ordinary, (Anderson), "repels the first and third preliminary defences, and in respect the second defence requires probation, reserves consideration until the cause comes to be advised on a closed record on the merits, and in respect the defenders have intimated that they are to reclaim to the Inner House, finds them liable in expenses," &c.

His Lordship in a note stated:—"Previous to the passing of the Reform Act, the burgh of Greenock was a mere burgh of barony. It was not represented in Parliament. . . . Hence it is quite clear that at that period at least the election of the magistrates and council was not regulated by the statute 16th Geo. II. c. 11. The passing of the Reform Act did not affect the rights or powers of the magistrates with regard to this matter. The privilege of returning a member to Parliament was by that Act conferred on the burgh of Greenock. The privilege, however, was not conferred on the magistrates and council, but on the qualified electors holding a £10 qualification under a new representative system. There was nothing in that statute which altered in any way whatever the position of its magistrates and council. The regulations of the statute 16 Geo. II. were therefore equally inapplicable after as before it. Municipal reform was introduced by the two statutes 3d and 4th Will. IV. c. 76 and 77—the former applying exclusively to the case of royal burghs, and the latter to burghs which returned members to parliament, other than royal burghs—such as Greenock, Paisley, Falkirk, and the like. Although the object of the legislature was to introduce the same general system of municipal election with regard to both classes of burghs, yet their positions were so far different from each other, that it was found expedient to introduce the new regulations by two separate statutes. Whether the provisions of the statute 16th Geo. II. shall be held to be still in force with regard to royal burghs it is unnecessary to enquire. The only question which the Lord Ordinary has to deal with, is, whether they can be *extended* to the burgh of Greenock, which is not now, and never was a royal burgh. It was maintained by the defenders that the statute 16th Geo. II. was to be considered as a general code of election law. The Lord Ordinary concurs entirely in that view, —subject however to this qualification, that it was a code applicable to the system of representation as it then stood. . . . The end and object of the whole statute was to secure a better and more efficient system for the return of members to Parliament; and all the regulations relating to the freeholders on the one hand, and the election of magistrates on the other, were subservient to that great end. In considering how far the regulations of the statute apply to the burgh of Greenock, it is apprehended to be quite clear that they did not apply to it at its date. By the treaty of union, the burgh representation of Scotland was limited to fifteen members, returnable exclusively by royal burghs. Its provisions therefore had reference to royal burghs alone. There are no grounds for maintaining that they apply to a mere

July 12. 1853. burgh of barony by force of express or direct enactment. And that perhaps is in itself a sufficient answer to the arguments of the defenders. But further, it appears to the Lord Ordinary that these enactments cannot be extended to Greenock by implication. . . . It seems absurd to say that regulations purposely introduced for the securing of Parliamentary elections through the magistracy shall be extended by implication to the election of a magistracy and council who have no concern with the election at all. The reason for the enactment altogether fails, and consequently, the Lord Ordinary has held that it cannot apply. The provisions of the statute 16 Geo. IV., when examined in detail, shew in like manner their complete inapplicability to burghs in the position of Greenock. Something was said at the debate as to the want of a title at common law on the part of the pursuer to insist on this reduction. There is no plea to that effect in the defences. But even if it had been competently raised, it is untenable in principle, and it is inconsistent with several previous decisions."

The defenders reclaimed, for whom—

Maitland, and the *Lord Advocate*, referred to Lord Eldon's judgment in *Tod, v. Tod*, 1827, House of Lords; and contended that no real distinction can be drawn between such a burgh as Greenock and other burghs, with regard to the code of election law, contained in the 16th Geo. IV. There was here a proper substitution and good election; *Cowan v. Magistrates of Wigtown*, 1782; *Ewan v. Glasgow Commissioners of Police; Burgesses of Inverury*, 14th Dec. 1820.

Mure, Neaves, and the *Dean of Faculty*, for the respondents, were not called on.

The Court unanimously "adhere."

Duncan & Dewar, W.S., Agents for Reclaimers and Defenders.

William Duncan, S.S.C., Agent for Respondent and Pursuer. (J. S. M.)

CULLEN v. SMEALE.

No. 249.

Statute 1579, cap. 83—Prescription—Business Account—Writ or Oath of Party.—A writer to the signet brought an action against the representatives of a deceased employer for payment of a business account. The employer had died within three years from the termination of the account. The action was not raised till seven years after his death:—*Held*, in conformity with the opinions of the whole Court, that the case fell under the statute 1579, cap. 83, and that the pursuer must prove the constitution and subsistence of the debt by the writ or oath of the party.

1st Division. This was an action for payment of the accounts of a writer to the signet, directed against the representatives of a Glasgow agent, by whom he had been employed. The accounts commence in April 1836 and terminate in February 1839. The employer died in January 1841, and the present action was not instituted until March 1848.

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Smeale.

The defenders denied resting-owing, and pleaded prescription. A preliminary question therefore arose, whether the statute 1577, c. 83, applied. Payment was not averred, and there was ample proof of employment and of promises to make remittances. The statute declares "that all actiones of debt for house-maillies, manis, ordinars, servand's fees, merchante's comptes, and uther the like debts, that are not founded upon written obligations, be per-

served within three zeires, uthewise the creditour sall have na action, except July 12. 1858.
 he outhr preife be writ or be aith of his partie." The pursuer contended that
 where three years have not elapsed during the original debtor's life, the sta- Cullen v.
 tute does not apply. Smeale.

The Lord Ordinary (Robertson) was of opinion that there was strong authority for this proposition in the case of *Auld v. Aikman*, 7th July 1842, and previous cases, but he felt difficulty in reconciling these cases with the case of *Alcock v. Easson*, 20th December 1842, and therefore he reported the matter to the Court on the question whether the statute applies?

The question was referred to the whole Judges, and to-day the case was advised.

Young, was for the pursuer.

T. Mackenzie, was for the defender.

The LORD JUSTICE-CLERK. The first consideration and what appears to be a conclusive consideration is, that the statute having a most general and comprehensive object in view, is general and unlimited in its terms. It states no exception. It contemplates none. It lays down a rule in peremptory terms, "that all actions of debt, for &c. be pursued within three years, otherwise the creditors shall have no action, except he prove" in a certain way. There is not an expression or shade of expression in the statute which opens any warrant for any exception for any of the accounts mentioned which is not pursued within three years. This consideration appears to terminate such a question as the present. The propositions contended for by the pursuer seem to be these; 1, That the death of the debtor who contracted the account alters materially the rules as to the position of parties, and the presumptions as to payment; 2, That if the contractor of the account dies within three years from the termination of the account the statute does not apply at all; 3, That if the representative does not aver payment, that state of things is sufficient to entitle the creditor to recover at once; 4, That after the three years (and this whether the party contracting died within the three years or after their lapse) the creditor is not bound to prove resting-owing, and that any cases to that effect are wrong; for to require resting-owing to be proved, is to require, as was said, more to be proved after the expiration of the three years than during the three years.

That the statute applies if the action is raised after three years if the debtor survived the three years, was not disputed perhaps in direct terms; but the death of the party contracting during the three years, though the action is raised after the three years, was maintained to be a fact quite sufficient to take the case out of the statute. Now this exception is not founded on any construction, but on a theory as to the policy and object of the statute, said to have been taken in some cases. It attempts an *exception within* the actual words of the statute. And this plea was certainly not the more recommended to us by the argument that the statute had been, even in the cases founded on by the pursuer himself, wrongly interpreted; that the very plea was in itself unsound, but was a sort of compensating blunder introduced to alleviate the hardship of previous blunders as to the statute. The whole of these views are unsupported by any authority. At present the only question which the Court can consider is, whether the statute applies to this case.

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In making a review of the cases, which it is very expedient to do after the case of *Auld v. Aikman*, it is impossible not to observe how much confusion and at least difficulty has been introduced, owing to the use of the term *prescription* in regard to the operation of the statute, and then from the consequent introduction of the rules and presumptions as to payment which different prescriptions enforce or relax in particular states of the facts. The term "prescription" might be a convenient mode of generally describing the statute; but when that term became familiar, the minds of lawyers laying aside a good deal the terms of the Act, began then to dwell on presumptions of payment or non-payment as important elements of consideration in regard to the effect and operation of the statute. Certainly a more fertile source of error could not well be conceived: And the progress of this sort of discussion led at last to the result, that instead of the earlier *dictum* that the statute went on a presumption of payment within the three years, it was at last stated that the statute went on the presumption of non-payment within the three years, and on a presumption of payment after the lapse of the three years, *which however was to obtain only* if the facts admitted of such a presumption of payment after the lapse of the three years. And to carry on the notion of prescription consistently, at last we got attempts at interruption of prescription, in order to exclude the operation of the statute. A very few days after my appointment a case occurred on that latter point in the Second Division, *Cochran v. Prentice*, 24th November 1841, before the case of *Auld*, and I then stated my opinion that the general terms of the statute *decided all such* questions—that the fact that an action of debt was brought after the three years, decided that the statute applied—that the statute did not introduce any *prescription*; and that when that was intended, the legislature, in acts a century older, used the appropriate and precise terms for prescription. That broad view of the statute the Second Division adopted very deliberately in the case of *Alcock* in December 1842, in a state of facts which made the case one of very general application. I adhere to the view then stated, and repeated in *Campbell v. Grierson*, 15th January 1848.

The pursuer contended that the proof required by the statute was by the writ or oath of the party contracting the debt—that this was the meaning of the expression "his party"—that therefore the rule took effect only during the lifetime of the contractor, or at least (though these are very different propositions), if the party survived three years from the termination of the account, (and which of these propositions we were asked to affirm it was not easy to understand):—and hence the pursuer contended that if the debt was not paid at the death of the contractor, the presumption of *non-payment* thereafter at once arises, and so the pursuer need not prove resting-owing—or in other words, is entitled to decree at once for payment (for to that the plea must come) if the representatives *cannot prove* that he paid. But under the statute neither more nor less is to be proved after the three years than during the three years—although what the pursuer has during the three years to make out may be much more easily done, and by evidence or presumptions which after the lapse of the three years are excluded by the statute. In all such actions of *debt* (as the statute well describes them) the pursuer must establish, even when the action is pursued within the three years, that the

sum sued for is due to him and unpaid. And unless the Court is satisfied of July 12. 1858. that they cannot give decree for the same. So, when after the three years the party brings his action of debt, he must prove by the writ or oath of his party (that is, of the defender whom he sues) that the debt is resting-owing, whether that defender is the contractor or not. If the statute applies, "then the creditor must shew by the writ or oath of the party that the debt has not been paid;" *Mackay v. Ure*, 13th November 1847. If that party is the contractor, it is difficult to comprehend how the fact that the account remains unpaid is not to be established. How can he get decree if he does not *prove* that point? If again the defender is the representative, is not the same proof of the debt—that is, of the same being due—still to be adduced? The statute in fact only declares and prescribes what proof shall be necessary and alone competent and sufficient if the action is raised after the lapse of three years, and applies whether the action is directed against the contractor or the representatives.

The views contended for by the pursuer, all arise out of an attempt to regulate the operation, and indeed, to affect the construction of the statute, by applying to it certain presumptions of payment or of non-payment which it is said various states of the facts may raise, and which the general doctrine as to prescription sanctions in most cases. But there is no warrant for allowing any presumption of payment or of non-payment to bear on the construction of the statute, or to regulate its operation. The statute shews plainly what was the object in view, viz., in regard to the debts mentioned to exclude, after three years, loose general proof of the subsistence of the debt, on the ground that recovery ought to have been sooner insisted in, and so to give protection to parties by a distinct limitation of the proof by which alone the action, if intended, after three years, can be supported and the debt proved. This statutory regulation is not depended on, nor does it set forth any presumptions of any kind, as to payment or non-payment. It lays down a plain and peremptory rule. In the application of the statute, the Court has really no right to restrain and narrow the protection afforded, by the effect ascribed to any particular presumption as to payment or non-payment in ordinary cases of a proper prescription. For the statute recognises no such materials for its construction or application, and its terms exclude all considerations but the simple element of *dates*. And if the dates are such as bring the case within the predicament of the statute, the rule is simply the statute itself. The decisions established no rules as to the operation of the statute such as the pursuer maintains. His Lordship then referred to the cases of *Ord v. Duff*, 15th Feb. 1630; *Wilson v. Torris*, 12th Feb. 1680; *Hay v. Earl of Linlithgow*, 16th July 1708; *Douglas v. Duke of Argyll*, 22d Feb. 1736; *Douglas v. Grierson*, 18th Nov. 1794; *Leslie v. the Town of Brechin*, 15th Nov. 1808; *Leslie v. Mollison*, 15th Nov. 1808; *Ellis v. Whyte*, 12th July 1849.

The notion that the statute proceeded only on a presumption of payment after the expiration of three years, so that if that presumption was any how removed, resting-owing need not be proved; and that there was any limitation to its application, or any other rule for its application than that the action was brought after three years, certainly receives no countenance from the institutional writers; M'Kenzie's Observations, p. 195; Stair, 2, 12, 30. Bank-

July 12. 1858. *Cullen v. Smcale.* ton, in treating of what is intrinsic in an oath given under the statute, states that the averment of payment is clearly intrinsic, because by the statute the debt after the three years must be proved to be *owing and unpaid*. And this rule he lays down as a general proposition, from which plainly he admitted no exception. In like manner, Dirleton introducing the subject under the Act 1579, in reference to the same point, (of intrinsic qualities), determines the question among other reasons by this—"There is a presumption in law, which is the ground of so momentary a prescription, that such debts are not so long owing. And therefore it ought to be proven by the defender's oath that they are owing." Stewart in his answers states without qualification, "that the presumption is for payment within the three years;" Erskine, 3, 7, 18. The true principle of the statute had been recognized in *M'Laren v. Buik*, 27th Feb. 1829; *Elder v. Hamilton*, 15th May 1833; *Ritchie v. Little*, 15th Jan. 1836; *Fisher v. Ure*, 5th March 1836. The case of *Auld v. Aikman*, 7th July 1842, seems to be the only decision in favour of the pursuer's plea. The principle on which this case proceeded was very fully considered in *Alcock v. Easson*, 20th Dec. 1842, and the judgment in that case is beyond all doubt directly at variance with it. All the prior cases were then reviewed, and to the explanation then given of them, I adhere. The same principle had been laid down by Lord Corehouse, in *Smellie v. Cochran*, 25th Feb. 1835; see also *Darnley v. Kirkwood*, 6th March 1845; *Campbell v. Grierson*, 15th Jan. 1848, as cases tending to destroy the authority of *Auld v. Aikman*. The result of a review of the cases, is, that *Auld v. Aikman* was wrong decided, and that there was no series of decisions warranting that judgment, much less fixing an exception which could not now be disallowed. On principle, there was hardly an attempt made to support the pursuer's plea. And for the grounds on which I hold that plea to be unsound in itself, it is sufficient to refer to the opinions which I have given in the cases of *Alcock v. Easson*, and *Campbell v. Grierson*.

LORD RUTHERFURD. In themselves, the words of the statute seem to admit of no doubt, and to exclude absolutely the present plea of the pursuer. It is said that for the debts mentioned in the statute, actions shall be pursued within the three years, otherwise the creditor shall have no action unless he either prove by writ or oath of his party. An exception so wide as this, and finding no countenance in the words of the statute, can scarcely be defended as construction. It has indeed been sometimes argued, that the words of the statute, admitting and requiring proof, by the writ or oath of the party, implied the immediate debtor to be still in life. The expression of the statute is *his party*, which cannot be construed to be simply the party contracting. It were very unjust so to hold it, for it would exclude the creditor from the benefit of the writ or oath of the debtor's representative, who became by his representation, debtor in the debt, and party to the action. *His party* plainly includes both the immediate debtor and the representative, where the action is brought against the representative, and this, the just construction, is that which the statute in practice has received. Any supposed presumptions on which the statute may have been founded, present a dangerous guide in the question of construction; and at this distance of time, mere conjecture as to the views of the legislature gives no safe ground for restricting the plain

meaning of its language. The better view is, that the statute without re- July 12. 1853.
 ference to conjecture, went upon plain reasons of policy and expediency in
 requiring that unless the creditor in such debts meant to rest his whole case Cullen v.
 upon the writ or oath of the debtor, he must bring his action within the three Smeale.
 years. If pursuit was postponed beyond that period, the demand was con-
 sidered as what has been termed a stale demand, and the creditor subjected
 to the necessity of proving the case in a manner to which the debtor could
 have no objections; the proof required being the debtor's writ or oath.
 This last observation suggests the only other point as to the construction of
 the statute upon which any question can be raised—under the words “ex-
 cept he either prove by writ or oath of his party.” The pursuer contended
 that under those words it would be sufficient even after the lapse of the three
 years, to prove by writ or oath the constitution of the debt, and that it was not
 required of him to prove that it was resting-owing. Why the word “prove”
 should be so limited as to embrace one part only of the case and not another,
 was not made to appear. The statute plainly implies the whole case, and
 does not restrict the proof to one part of it only. It is remarkable too that
 the part of the case, namely the *subsistence* of the debt, which the pursuer
 would represent as not affected by the limitation of the statute, but which it
 was still left to the defender to meet in an action beyond the three years, as
 in an action within the three years, has been the very point upon which the
 questions turned in the greater number of cases. This is obvious from a very
 cursory survey of the reports. Nor on this point should the provisions of the
 statute 1669 be overlooked; which, in establishing a similar short prescription
 in regard to “minister's stipends, multurs, and mails and duties,” says, that
 these shall prescribe, not being pursued within five years after the same are
 due, or after the tenants shall remove from the lands, “except the said
 minister's stipends, multurs, mailla, and duties shall be offered to be proven
 to be due and resting-owing by the defenders, their oaths, or by a special writ
 under their hands acknowledging what is resting-owing.” It can scarcely be
 doubted that the statute proceeded upon the same views which led to the
 previous Act of 1579, and that the case which the pursuer required to prove
 under the one statute, was the case which he required to prove under the
 other. In this matter the statutes establishing sexennial prescription of bills,
 are perhaps of less importance, except as shewing that the same difficulties are
 placed in the way of a pursuer leaving his case without pursuit in the one
 case as in the other; the whole case, subsistence as well as constitution, being
 expressly required to be proved at the hands of the pursuer, by the writ or
 oath of the defender. These remarks upon the meaning of the statute seem
 to be in every view of the case not without importance, for it seems to be one
 very little subject to construction from the clearness of its provisions, and it
 would require a very strong course of decision to control its application in a
 matter plainly within its letter.—His Lordship after referring to the decisions
 and authorities, stated: It appears then that there is no ground whatever for
 the pursuer's argument upon the original construction of the statute, but that
 the statute, when it applies, places upon the pursuer the proof of establishing
 both the constitution and subsistence of the debt, exactly as in the quin-
 quennial and sexennial prescription. He must prove his whole case in short,
 and his only proof is the writ or oath of his party.

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While the pursuer's plea on this point seems untenable, it seems not less so upon the other, that the death of the debtor within the three years precludes the application of the statute. The words of the statute give no countenance to so large and extraordinary an exception, which would plainly operate most capriciously, from the case where an account was closed by the death of the debtor to that in which he did all but survive the three years. The early cases, and, indeed, down to *Leslie*, are inconsistent with the exception contended for. The proposition of so limiting the construction of the statute, which, till the case of *Auld*, never passed into direct decision, seems to have arisen from some judicial observations, perhaps imperfectly expressed, not directed to the application of the statute, but to the import of the proof required, with reference to the presumptions upon which the statute was supposed to proceed. Certainly much has been said to countenance the plea of the pursuer; but, as already observed, that plea does not stand upon any train of judgment, and during the course of the very decisions to which he appeals, there are other judgments, under this very statute, which cannot be reconciled with the plea. There seems very little occasion, in such circumstances, for any strong appeal to practice. The practice could not be clear or uniform where there was not only such difference of opinion but such varying decision. There seems no ground, therefore, on which to contend that the Court is at all precluded from going back upon the whole matter, and correcting, after the fullest consideration, one erroneous judgment, and it may be, some erroneous opinion. It would appear, in the whole matter, that the judgment to be pronounced should be to find that the case falls under the statute, and that the pursuer must, in terms of the statute, prove the constitution and subsistence of the debt by the writ or oath of party.

The rest of the consulted Judges concurred in the opinion of the Lord Justice-Clerk and Lord Rutherford.

The LORD PRESIDENT did not consider it necessary to go into any detail, after the opinion returned by the consulted Judges. With these he entirely concurred.

The rest of the Court concurred.

The COURT, therefore, "in pursuance of the opinions of the whole Judges, find that this case falls under the statute 1579, cap. 83, and that the pursuer must, in terms of that statute, prove the constitution and subsistence of the debt by the writ or oath of the party," and with this finding, remit "to the Lord Ordinary, reserving all questions of expenses."

John Cullen, W.S., Pursuer's Agent.

Gibson-Craig, Dalziel, & Brodie, W.S., Defender's Agents.

(J. S. M.)

No. 250.

TAYLOR OR STEVENSON v. STEWART.

Minister—Glebe—Landlord and Tenant—Fiar and Liferenter—Messis sementem sequitur.

2d Division.

July 12. 1853.

Taylor v.
Stewart.

—The glebe of a certain parish was let to tenants who paid at each Whitsunday and Martinmas their rent for that year. The minister died before Whitsunday, and at the date of his death a portion of the glebe had been sown by the tenants:—*Held* that the minister's representatives were entitled to the year's rent effeiring to the portion of the glebe which had been sown at the date of his death.

Stevenson, minister of Wilton, died on 18th April 1851. At that date

the glebe lands, which are very large, were not in his personal occupation, July 12. 1853. but had all along been let to tenants under leases, terminable on Stevenson's ceasing to be incumbent. These leases were all granted with entry at Martin-^{Taylor v. Stewart.}mas, and the rents were payable under them half-yearly at Whitsunday and Martinmas, the rents of each year's possession ending at Martinmas, and of each year's crop being payable at Whitsunday and Martinmas of the same year. At Stevenson's death a crop had been sown by the tenants on a portion of the glebe. Mrs Stevenson, as executrix of her husband, uplifted, at Whitsunday 1851, one half of the rents of the whole glebe for crop and year 1851. On 27th September following, Stewart, the defender, was inducted as minister of Wilton, and he uplifted the other half of these rents payable at Martinmas. Mrs Stevenson now raised action against him, concluding to have it declared that as executrix of the late minister, she was entitled to the rents of the glebe lands payable for crop and year 1851, or at least to the rents effeiring to the lands sown by the tenants and in crop during Stevenson's lifetime; and further concluding that Stewart as intromitter with the Martinmas rents should hold count and reckoning with her. The defender pleaded;—1, That Stevenson having died before Whitsunday 1851, his executor had no claim to the Martinmas rents; 2, That deceased not having been in the personal occupation of the glebe, or sown it, his executor was not entitled to the crop of 1851, the right having terminated by his death; and that the maxim *messis sementem sequitur* did not apply; 3, That the rents being to a great extent payable for a crop not sown at Stevenson's death, the principle would be inapplicable, even were it to be extended to the case where tenants were in possession; and 4, That the defender having been inducted before Michaelmas, was entitled to half the profits of the benefice for that year.

Lord Curriehill, (Ordinary,) "Finds that, at the time of the death of the pursuer's author, a crop had been sown on a portion of the glebe of Wilton by his tenants: that these tenants, in his right, were entitled to reap, and did, *de facto*, reap, the crop which had been so sown by them at that date: and that the pursuer, as his executrix, became entitled to such a portion of the rents paid for the whole of the glebe for crop and year 1851, as corresponded to that part of the glebe on which the crop so sown and reaped was grown: Finds that the pursuer, as executrix foresaid, uplifted and received one-half of the rents of the whole of the glebe for the said crop and year: Finds that the defender intromitted with the other half of these rents, and is in consequence accountable to the pursuer for the balance of the proportion, which was payable to her as aforesaid, of the whole of the said rents, if any such balance remained after crediting the half-year's rent received by the pursuer: Finds that the pursuer has no right or title to call the defender to account for the rents intromitted with by him, except in so far as the same were payable for the portion of the glebe of which the crop had been sown at the time of Mr Stevenson's death; and that, in such accounting, she must give credit for the sum received by her as aforesaid; and before farther answer, appoints the cause to be enrolled, in order that the mode of accounting in conformity with the foregoing findings may be arranged." His Lordship added the following "Note.—It is established law, that when the minister of a parish has sown a part of his glebe and dies before the crop is reaped, his representatives are entitled to

July 12. 1853. reap that crop. It appears to follow, that when, in such circumstances, the crop is sown by those in right of the minister, as his tenants, these tenants, as in right of the minister or his representatives, are entitled to reap it; and that when they accordingly do reap it, they are liable to his representatives for the rent of that portion of the glebe which has so been sown and reaped. On the other hand, it being established law that a lease of a glebe by a minister is not effectual after his death, and that his representatives are not entitled to remain in possession after his death, excepting to reap the crop sown during his lifetime, it also appears to follow, that his tenants after his death are not entitled, as in right of him or his representatives, to remain in possession to any greater extent: that his representatives have no right to the rents, payable for any period subsequent to his death, of such portion of the glebe as had not previously been sown by him or his tenants; and therefore, that his representatives have no title to call upon intruders with rents of such portions of the glebe to account to them for the same.

Taylor v.
Stewart.

Stewart reclaimed, for whom—

Patton argued, that the representatives of a liferenter predeceasing Whitsunday have no right to the rents of the liferented lands for that year, *when these lands are let to tenants*; Erskine, II., 9, secs. 64, 65. A clergyman is in no more favourable position than a liferenter; *M'Callum v. Grant*, 4th March 1826.

Penney, *contra*.

The Court unanimously "adhere," with the expense of opposing the reclaiming note.

Adam Paterson, W.S., Reclaimer's Agent.
John Forrester, W.S., Respondent's Agent.

(J. M. M.)

No. 251. THE BRITISH GUARANTEE ASSOCIATION v. THE WESTERN BANK OF SCOTLAND.

Cautioner—Guarantee—Obligation—Representations before contract—Undertaking—Proof—Evidence.—A party granted bond of caution to a bank for the faithful discharge by one of its tellers of the duties of his office; the cautioner had previously asked the bank in writing, "how often it would balance the teller's accounts? and what are the checks used to secure accuracy of accounts?" To which the bank replied in writing, "His cash is checked weekly by a brother-teller and by the cashier separately, and monthly by the directors:"—*Held*, 1, That the above question and answer were not superseded and made of no avail as an undertaking by the bank, in respect of their neither being contained in nor referred to in the bond of caution subsequently granted. 2, The question coming to be tried before a jury,—Whether the cautioner had granted his bond in reliance on a representation and undertaking made by the bank in their answer to his question respecting the manner in which the teller's cash was checked? and whether the bank had failed to implement such undertaking? two exceptions were taken; *the first*, to the Judge having refused to allow evidence to be led of the general practice of bankers as to checking their teller's accounts; *the second*, to his having charged the jury, that the question, whether there was an undertaking on the part of the bank, depended "on the point, whether the matter represented was material to the interests of the party putting the question? and that if the jury thought it material, then, taking the paper as questions put to employers before cautioners entered into an obligation, it was to be held as an undertaking given to the cautioners on which they might rely." *Exceptions disallowed.*

2d Division.
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In August 1849, a proposal subscribed by Dewar, a teller in the Western Bank, and by the manager of the bank acting on its behalf, was made to the

British Guarantee Association, with a view to the association becoming security to the bank for Dewar. This proposal, (No. 5 of process), was in the form of questions by the association, and answers thereto by the applicant and his employer. In answer to the question under head 3, "How often the employer would balance the applicant's accounts? and what are the checks used to secure accuracy of accounts? the bank stated, "His cash is checked weekly by a brother-teller and by the cashier separately, and monthly by the directors." The association agreed to come under the proposed guarantee; and, accordingly, a bond was granted in favour of the bank. It proceeded upon the narrative, that Dewar had been requested to find security for the faithful discharge of his duties as teller in the bank, and that the association had agreed to become his cautioners upon the terms and under the conditions and provisions after mentioned, and in consideration of the premium therein expressed. Then Dewar, as principal, and the Guarantee Association as cautioners, sureties, and full debtors for and along with him, became bound that he should faithfully perform the duties of his office, "and for all loss and damage which the said bank may sustain by and through my actings, intrusions, dishonesty, fraud, or failing to account for the funds under my control, or with which I may be entrusted by the said bank while in their employment." The amount of the guarantee was limited to £1500. The bond contained no stipulation as to any control or check to be exercised over the actings of Dewar. Dewar having absconded in 1850, leaving defalcations to the amount of upwards of £2500, the bank gave the Guarantee Association a charge for payment upon the registered bond. The latter suspended, on the ground that the checks used by the bank over their tellers were entirely insufficient to secure accuracy in their accounts; and pleaded, that the charge ought to be suspended, in respect of the bank's failure to implement, and violation of the duties incumbent upon it under the proposal for guarantee, which formed the basis of the contract of parties. The chargers averred, that their mode of checking their tellers was both the usual and a sufficient mode; and pleaded, that it was irrelevant to inquire how far or in what manner they might have enforced any control or check over Dewar, or whether such control was or was not sufficient, no obligation to that effect having been undertaken by the bank to the suspenders, or any such control or check made a condition of the bond.

The case was tried by the Lord Justice-Clerk upon the following issue: "Whether the complainers, (suspenders), granted the bond of guarantee . . . for the intrusions of James Dewar, as teller in the Western Bank of Scotland, in reliance on a representation or undertaking made on behalf of the chargers in the document, No. 5 of process, respecting the manner in which the cash of the said James Dewar was checked in the said bank? And whether the respondents failed to implement said undertaking, to the prejudice of the said complainers?" At the trial it was proved that the checks employed by the bank were so superficial as to be merely nominal. The counsel for the chargers then called the cashier of the Union Bank, Glasgow, and interrogated him; "What is the usual course followed in checking the cash in your bank? On this question being objected to, the counsel for the chargers stated that he did not propose evidence to construe the words, and to shew

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July 12. 1853. the meaning of the answer made to the query contained in the proposals ;
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 Guarantee
 Association v. silver were not opened or inspected at checking in Glasgow, and in the gene-
 West. Bank of ral practice of banking ; and only to construe the undertaking in this way, so
 Scotland. as to shew that what was usually done by the chargers, was fairly within
 practice." The Judge sustained the objection, to which ruling the chargers

FIRST
EXCEPTION.

whether there was an undertaking on the part of the chargers, depended in the first place, on the point, whether the matter represented was material to the interests of the party putting the question. Many explanations or representations in such answers may not be material. But the question was always important, whether the matter of the representation was material to the interests of the party putting the question. If not material, then that would put an end to the plea of an undertaking on a question which does not depend upon express warranty. Whether the question and answers related to a matter which was material, was a question for the jury. If the jury thought the representation material, then he directed the jury in point of law, that taking this paper as questions put to employers before the cautioners entered into their obligation, it was to be held as an understanding given to the cautioners on which they might rely. If the jury thought the matter not material, then there could be no undertaking in this case. He further directed the jury, that, in so far as the bank pleaded, that although the matter might be material, yet there was no undertaking by them under these questions and answers, because that paper is not referred to in the bond which the pursuers granted, and they received ; that plea involves,—*First*, A point of law, which point he saved for the Court ; and *Second*, The argument to the jury, that the association did not in point of fact rely, or place any importance upon this matter, because they did not refer to it in the bond ; which was a matter for them to consider in forming their opinion whether the matter was material. Whereupon the counsel for the chargers did except to the foresaid directions of the Lord Justice-Clerk, in so far as he told the jury, that the question, whether there was an undertaking on the part of the chargers, depended on the point whether the matter represented was material to the interests of the party putting the question ; and in so far as his Lordship directed the jury in point of law, that if the jury thought the representation material, then, taking the paper as questions put to employers before the cautioners entered into their obligation, it was to be held as an undertaking given to the cautioners on which they might rely. The counsel for the chargers further did request the said Lord Justice-Clerk, to rule that there was no case to go to the jury, in respect that the construction of the document, No. 5 of process, as regards the undertaking therein alleged to be contained, was matter of law ; and that there being no such undertaking constituted by the terms of that document, the chargers were entitled to a verdict ; which direction the said Lord Justice-Clerk refused to give. Whereupon the counsel for the chargers did except to the said refusal."

THIRD
EXCEPTION.

Verdict in favour of the complainers, the Guarantee Association,—reserving to the Court to enter judgment for the chargers, *non obstante veredicto*, if the Court were of opinion that there was no undertaking between the parties

under the document, No. 5 of process, because the same was not referred to, July 12. 1853. or repeated in, or made a condition of, the bond of guarantee.


Patton, Penney, and Neaves, for the chargers, and in support of the bill of exceptions. The question and answer contained a mere statement of matters as they stood at the time, and if this was erroneous, or misrepresented, it will afford a good ground for reducing the bond of caution. But they contained no representation or prospective undertaking. Had such been meant, it would have been referred to in the bond. Even assuming an undertaking, the omission to refer to it in the bond is fatal; it is no better than a correspondence anterior to the completed contract of parties.

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T. Mackenzie, and Dean of Faculty, contra. There was here a representation on which a cautioner was entitled to rely, as to what was, and what would be, the constant working machinery of the bank. It was unnecessary to state this in the bond, for it was not a condition of it.

LORD COCKBURN. The *first* exception is *against the rejection of evidence* tendered by the chargers. I am of opinion that this exception ought to be allowed. One of the questions put by the suspenders to the bank was, "*What are the checks used to secure accuracy of accounts?*" To this the answer was, "His cash is *checked* weekly by a brother teller and by the cashier separately, and monthly by the directors." *Checking* is a word which does not necessarily denote any one particular operation. This word was used by a bank in reference to a bank proceeding. Now the chargers wished to shew by evidence what was deemed proper checking by the *general practice of bankers*,—their object being to shew that they did check this teller's cash, in the way in which such a thing is understood to be done. But all evidence upon this subject was rejected. I think this was erroneous. It was the jury's business to determine whether, in point of fact, the chargers had done what their answer was said to profess that they would do; and I think that the chargers were entitled to instruct the jury, by evidence, as to the only way, or the usual way, in which this act is performed. We may think that no practice could make what the chargers did, a proper checking. But we are not the jury; and even a Court would not be warranted in making up its mind without first letting in this light. The *second* exception is to that part of the direction in which your Lordship told the jury, that if they thought the representation conveyed in the chargers' answer *material*, then this, in law, amounted to *an undertaking*. I think this direction correct, *in relation to the circumstances*. The suspenders, before entering into a guarantee, put a question of fact to the chargers, who wished for the guarantee. It happened to be put in writing, and a written answer was given. But all this might have been done verbally. The inquiry related to the degree of risk to be incurred; and as this depended essentially on the free or the controlled possession of money by the teller, the suspenders maintain that the question and the answer, in their plain meaning, referred, not to the past or to the present checks on him,—in neither of which had they any interest,—but to the checks that were to protect them *during the currency of the guarantee*. The chargers made an answer which the jury *must* have thought both material and applicable to the future practice, and not properly adhered to; because, if they had not been satisfied on all these points,

July 12. 1858. their verdict *must* have been in favour of the chargers, and not against them.

 The representation implied in the answer *produced* the guarantee; and so the jury *must* have held. But it is said that the jury were led into this result by a misdirection. No authority whatever was referred to from the law of Scotland against the direction, and I keep within our own law. And here my only difficulty consists in seeing where the doubt is. I never heard the general principle even questioned, that a contract entered into on a material misrepresentation by one of the parties, is voidable on this account by the opposite party, who is thereby injured. Since even substantial *error* is a ground of reduction, I cannot comprehend how a substantial representation of a future practice not adhered to should not be a ground of reduction also. This principle is so familiar to every Scotch lawyer, that it is really needless to say more about it. And the necessary result is, that an *undertaking* to make the representation good was implied in the representation. The *reserved* point is, whether the undertaking was excluded because it was not referred to or made a condition *in the bond* of guarantee. My opinion is that it was *not* excluded. Here, also, I am not aware that any authority in the law of Scotland was produced in favour of the chargers' view of this question, except that this was the rule in cases of marine insurance. Well, conceding it to be so in that particular class of transactions, this is no reason for its being extended to all transactions. This bond expresses the guarantee and some of its conditions, as to neither of which is there any doubt; but it does not profess to set forth *its inductive causes*. Bonds very seldom, and never necessarily, engross the representations on which they proceed. Life policies, *ob majorem cautelam*, very generally refer to the previous statement of his personal condition made by the applicant; but I do not conceive this to be legally indispensable. I know nothing, except its inconvenience, to hinder a life policy to be granted on verbal inquiry and verbal representation, and not alluded to in the instrument.

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LORD WOOD. The queries contained in the form of proposal, and to which answers were required according to the obvious intendment as disclosed by the terms of the proposal and queries, and the course of the transaction, were obviously put in order that the complainers might obtain the information necessary to enable them to judge of the extent of the risk they would run, and the amount of the premium to be charged, should they undertake to guarantee the fidelity of Dewar; and whether they should do so at all, or not, might be dependent on the answers they received. The query under head three is put to the employers of Dewar before the complainers entered on any cautionary obligation for him, in order that they might previously learn what would be done to secure accuracy in his accounts; and the answer is obviously a statement of the things *that would be done* to secure accuracy. If that is not its meaning, I am at a total loss to discover any other which is intelligible. It is decidedly not a statement solely explanatory of what was then done by the chargers. The query is prospective. The answer is prospective also; and represents as the security afforded a thing within the control of the chargers. 1. The *first* matter to which I shall advert, is the question of law reserved. Assuming that if the matter represented was material, and if the bond of guarantee was granted in reliance upon it—both of which

are facts found by the verdict of the jury—then this amounted to an under- July 12. 1853.
 taking by way of representation on the part of the chargers, that what was so
 represented was to be implemented on their part; I am of opinion, that ^{Guarantee}
 although not inserted or referred to in the bond afterwards granted, it was ^{Association v.}
 obligatory on the chargers. It was not of the nature of a condition precedent ^{West. Bank of}
 Scotland.
 to the obligation in the bond, nor was it of the nature of a warranty. It was
 a representation with respect to a *future* state of matters collateral to the ob-
 ligation in the bond,—and, as an undertaking by representation, it was one
 not requiring specific but only substantial performance. The extent of the
 undertaking, as contended for by the complainers, was only that the mode of
 checking observed should be fair and reasonable, not merely nominal. But
 that being the character of the undertaking, I think that it was properly left
 to stand upon the proposal containing the query and answer demanded as pre-
 liminary to, and for the purpose of guiding the complainers in becoming or
 not becoming cautioners for Dewar; and that, according to the law of Scot-
 land, the query and answer were not superseded, and made of no avail in re-
 spect of their neither being contained in, nor referred to, in the bond of cau-
 tion. It would be an extraordinary proposition to maintain, that everything
 which one party *intuitu* of a contract had, upon the application of the other,
 specifically stated would be prospectively done by him in reference to the sub-
 ject-matter of the contract, was (unless the representation could be shewn to
 have been made with a fraudulent purpose at the time) to be of no obligatory
 effect, if in the written contract itself it was not inserted or specially referred
 to—and *this*, however clear it might be that the contract proceeded in reli-
 ance on it, and its terms must have been influenced by it. 2. The next mat-
 ter is the exception to the direction given at the trial. If I am right in holding
 that there may be an undertaking by representation, I can have no doubt as
 to the correctness of the direction. There are different kinds of representa-
 tion. There are representations which have reference to the existing or
 believed existing state of things at the time; there are others which are re-
 presentations in regard to things future. The representation in the present
 instance, as contained in the answer to query three before referred to, when
 taken in connection with the query, is clearly of the last description. It was
 only the future state of things which could be contemplated, or in which the
 party putting the question could have any interest; and *that* which it was
 answered would be done by the party making the answer, was entirely with-
 in his own control. Now it is true that it is not every representation, whether
 it be of the one kind or the other to which I have referred, that will infer an
 undertaking by the party making it. The representation may not be material,
 or the agreement, to which it was precedent, may not have been entered into
 in reliance on it. But assuming, as must here be done, that there may be a re-
 presentation in relation to a *future* act or course of proceeding on the party of
 the party by whom it is made, which shall amount to an obligatory undertaking
 as collateral to the contract to which it had prospective reference, although it
 does not enter the formal written instrument afterwards executed, it appears to
 me, that the points on which, in the present instance, it was proper to direct the
 jury, were the materiality of the matters of the representation to the interest of
 the party putting the question, in answer to which the representation was elicited,

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and the reliance of that party upon it in granting the bond of guarantee. I therefore think that the direction was the appropriate and correct one to be given for the guidance of the jury. 3. I think the evidence of the general practice of other banks was properly rejected as *inadmissible*. In considering this point, it is necessary to attend to what had been proved by the evidence adduced by the complainers, and in reference to which the evidence of practice was offered; and also the object for which it was offered, as explained by the counsel for the chargers. It had been clearly established that the checking which took place was absolutely nominal. Bags were taken to contain gold, and a certain amount of it, without even opening the bags, and without any weighing of the contents, and this merely in respect of the labels upon them; and the same thing was done with those said to contain silver;—while the fact in the *first* case was, that the bags contained silver—and in the *second*, that they contained copper. In this state of the evidence, which it was not proposed to controvert, and by which, therefore, the utter want of anything that could be represented as in itself approaching to any check was clearly proved, of what relevancy was the evidence tendered? If there was an undertaking in regard to checking Dewar's cash, then, upon the words of the question and answer, it was a checking to *secure accuracy* of accounts. If upon the terms of the representation, the undertaking was, that a real and substantial checking was to be used to secure accuracy of accounts, I do not see how the chargers could be absolved from fulfilling it, by a proof that, by the practice of other banks, the teller's cash was not checked at all, or, what is the same thing, that the chargers did that which, whatever name might be given to it, was in truth not a checking at all. Now it will be observed, that the chargers do not say that the words of the query and answer, by themselves can be read as importing a mere nominal checking: And farther, they do not say that any explanation was given when the representation was made, or at any time prior to the execution of the bond of guarantee, or, indeed, even at any subsequent date, that all that was meant by the checking which it was represented was to be used, was a checking in accordance with the ordinary practice of banking establishments. That is no part of their case upon the record. Well, then, let us look at the object of the evidence as explained by themselves. If, as their counsel stated, it was not to construe the words, and shew the meaning of the answer, and if their meaning, left without construction by the evidence tendered, was, that the checking undertaken was a real checking, not a nominal checking, I hold that the evidence was inadmissible, because it would then be entirely immaterial to the issue, whether the checking used by other banks was nominal or not, or was such as it was offered to be proved it was. The checking which was observed might be within the alleged practice of bankers; but if that practice was not to use any substantial check, but a nominal one only—an undertaking which, by its words, imported the use of a real check, which words it was not proposed to construe or shew the meaning of, could not be affected one way or other by the proof of the practice desired to be put in evidence. No practice, however universal not to check at all, could operate to the benefit of a party whose undertaking, by its own words, was a real substantial check. To say that while the chargers disclaimed resorting to the evidence for the

purpose of construing the words, or the meaning of the answer, they only desired to adduce it to shew that the checking observed was agreeable to practice, and to construe the undertaking so as to shew that what was done was fairly within the practice, is in fact simply to propose to do by the evidence that which in the outset they disclaim having any intention of doing. It is just to construe the meaning of the words in which the undertaking is expressed, by the practice of bankers. And farther, it is also to be kept clearly in view that the evidence of practice was not offered in order to shew, that what was done by the chargers as a checking of the cash *was a substantial implement* of the undertaking,—which would have been a very different matter, inasmuch as substantial implement is, as I have already noticed, all that could be required, and which might be given not in one way but in various ways; so that, if the question had been, whether what was done was substantial implement, then what bankers were in the practice of doing, as affording such implement, would have been of the clearest relevancy.

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LORD JUSTICE-CLERK. I did for some time entertain some difficulty on the point reserved, but that difficulty is removed. By special stipulation, parties may covenant for certain conditions being made an indispensable and essential basis of a contract; so that they shall not be bound unless these conditions are fulfilled, either, as the case may be, before the contract commences and the counter-obligation attaches, or during the currency of the contract. But such conditions are substantially different in character, object, and results from a representation made, which, (as the verdict in this view of the case is to stand), we are to assume, induced the party to enter into the contract in reliance on the undertaking contained in such representation. Hence I am satisfied, that after the finding of the jury, the suspenders, pursuers of the issue, are not deprived of the right which that finding gives them, merely because this representation is not contained in the bond which they granted. This opinion in no degree interferes with the rule, that letters prior to a regular completed written contract cannot be referred to in order to prove the subject-matter of the contract to be different from that which the written document contains, or to control or affect the terms of such contract. The obligation of the suspenders remains under the bond which Dewar and they granted. But they plead that the right to recover is lost, because they entered into *their obligation* in reliance on the chargers fulfilling a representation on a material matter within their own power, which, being material, and within their power, thereby became an undertaking to them, the suspenders, who so granted the obligation founded on. On the point on which difference of opinion exists, I will state the grounds on which I held the evidence tendered to be inadmissible. The question to be tried was this,—whether, on the materials given to the suspenders, the question put by them, and the answer made to them by the bank, the examination of the cash and accounts of the teller, to which the question and answer respectively related, was to be held on the face of these two writings to be a real examination or a nominal one, which might be, consistently *therewith*, wholly nugatory and useless. I say consistently *therewith*—with the question and answer; for the true and proper inquiry between the suspenders and the bank is, whether this question and answer did import a real and effective examination, or a nominal check carried

July 12. 1853. on in any way, however loose, which the indolence or interest of the parties may lead to. That is the main question for the jury; but it was also one in which the Judge must form his own opinion, in order to see if the evidence tendered is relevant to the issue which the jury is to try. Did the question and answer relate to checks such as would fairly secure accuracy, and prevent, at the time of checking, fraud and embezzlement—the risks against which the suspenders wished to know the security, so far as the investigation by the bank could prevent it? Or did the answer simply express,—“We, the bank, check in our own way, and to our own satisfaction: We do not mean that we use any effective check, but we do ourselves in one way or other check, and we are satisfied with the way the thing is done.” Is that the meaning? In either light it appeared to me that the evidence tendered was wholly irrelevant. If the question and answer, or the latter, by its terms, related solely to what the bank themselves thought sufficient, or to what went on without the knowledge of the directors, and if they did not mean any real examination, then, of course it could be of no consequence what other banks did; because then, *ex hypothesi* on that view of the matter, although all other banks did make a substantial examination of their teller's cash, still this bank, by this statement, intended to state, and did state, no such examination. On the opposite view, did this question and answer mean, that there was any real and *bona fide* examination at the time of checking, to secure apparent accuracy, then it seemed to me that the evidence was wholly irrelevant. Equally on a third view, whether the question and answer did truly import a real examination or not, the evidence was inadmissible. The question is one between the bank and the parties who become cautioners to them. It is not an inquiry whether (supposing such an issue to be competent) the bank were negligent and remiss in the superintendence which ought to have been exercised over tellers, and whether, owing to such negligence, frauds were committed, and whether that negligence liberated the cautioners. Suppose such a defence to be relevant, then it might be material to shew, that what the bank did was in accordance with the ordinary practice of the officers of other banks, for there is no question here as to the proper custom of banking. But such was not the inquiry. It is, whether a particular representation inferred an undertaking to the cautioners, and whether that undertaking was implemented. Now, whether what the bank officers did was usual or not among the officers of other banks, cannot bear on this inquiry. The answer did not state, “We check in the way usually done in such cases, and in the way most convenient and handy for our officers, and the officers of all such establishments.” Hence the answer could not import or bring into the issue the usual practice of the officers of other banks. The question related to an undertaking, if it was one, of which the jury were told that fair and substantial fulfilment was all that the suspenders could require: That no one particular mode of examination was referred to, nor need be always observed: That the bank might alter and vary their mode of examination as they chose, provided that, when it was done, it was a real and useful examination, productive of real results: That it was not implied that the checks should be so perfect and minute as to prevent the loss or abstraction of small sums, say £100 or so, but a fair and real examination of one kind or other: That it was not necessary that all the gold or silver in bags should be

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counted : That it would be enough if the weight of a bag of 100 sovereigns July 12. 1858.
 being known, and the bags seen to contain gold, one might be weighed, and the others weighed against it, and so on ; or, as in foreign banks, a man might empty the bags into others by *cupfuls*, of a cup or measure ascertained to hold, when level to the top, a certain quantity of gold or silver coin—thus giving substantial accuracy. Actual counting over of the gold or silver is not stipulated for, and is not within the plea raised by the suspenders. Hence the proposed inquiry, whether other banks counted over the gold and silver, and whether that was within the usual practice in banks of their officers, really has nothing to do with the inquiry, whether what was done was in implement of the obligation in this paper, if it imported a real examination—or with the inquiry, whether a real examination was intended by the answer. If what was actually done by the chargers was utterly useless as a check, then if the answer imported a real examination, the failure was surely not diminished by shewing that a similar mockery of an examination went on among the interested or indolent officers in other banks. Again, if the line of evidence, (for nothing turned on the terms of the particular question), was proposed as it was, not to construe the terms employed—for that object was disclaimed—but to shew that the usual mode of dealing was such as was carried on in the chargers' bank, then the evidence is clearly beside the issue altogether. The answer did not guarantee any particular mode of checking. The inquiry is, did it import a real and useful examination. If it did, then what defence is it that other parties also checked in such an ineffectual and ludicrous manner? If the evidence was tendered in order to shew that a real examination was not in the contemplation of the bank, then the evidence was inadmissible, as knowledge of such practice is not brought home to the suspenders ; 2d, Because the question is, what expectation the answer, as actually worded, entitled the suspenders to entertain ; 3d, Because the chargers were bound, if such was their own meaning, to have made it clear ; 4th, Because if a farce only was contemplated by the chargers, then such a plea is contrary to good faith. When evidence is tendered, and its object stated, in order to enable the Judge to decide whether it is relevant or not, the party cannot propose a different object from that stated in the bill, and at the time to the Judge. To construe the meaning of the words " cash is checked," the evidence was not tendered. If it had, I should certainly have rejected it as wholly inadmissible—1st, Because the words are matter for ordinary understanding by the use of an expression of common and general import ; 2d, Because, if the terms, in the language of banks, had acquired any fixed meaning in that trade, that should have been explained, since the chargers themselves introduced the terms ; or knowledge by the suspenders of such meaning averred and proved ; and, 3d, Because the evidence was not even offered to shew that the expression, " his cash is checked," had any such artificial and technical meaning in the trade of banking ; and when the object of offering evidence is stated at the trial, and that object is special and limited, it is incompetent to except to the rejection of it by stating another and a different object. But, in truth, the party did not support the exception on any other ground than that stated in the bill.

Guarantee
 Association v.
 West. Bank of
 Scotland.

July 12. 1853. The Court "disallow the exceptions, and refuse the bill of exceptions; and on the point reserved for the consideration of the Court, find that the suspenders are not excluded from insisting in, and proving the issue, because the representation in the document No. 5 was not referred to or repeated in the bond of guarantee No. 29 of process, and from shewing that the said document did amount to an undertaking in the state of facts disclosed in the evidence; and find that the chargers are not entitled to judgment in their favour, notwithstanding the verdict, on the ground stated in the question reserved for the Court: Find the chargers liable in the expenses of the discussion of this bill of exceptions, and remit," &c.

Guarantee
Association v.
West. Bank of
Scotland.

Smith and Kinnear, W.S., Chargers' Agents.

Hope, Oliphant, and Mackay, W.S., Suspenders' Agents. (J. M. M.)

No. 252.

PETITION, SIR J. MILLES RIDDELL, BART.

13 and 14 *Victoria, cap. 36, §§ 25, 36—Entail Amendment Act—Sale—Consent—Substitute Heirs.*—In an application to sell a portion of an estate entailed subsequent to the passing of the Entail Amendment Act, for the payment of debt forming a charge on the fee of the estate:—*Held* competent to follow out such proceeding while no substitute heir whose consent would be necessary to disentail had been or could be called as a party thereto.

1st Division.

July 13. 1853.

Petition. Sir
J. M. Riddell.

This was a petition for authority to sell a portion of an estate entailed subsequent to the passing of the Entail Amendment Act. The petitioner was heir of entail in possession of Ardnamurchan and Sunart. In 1851 he obtained authority to disentail. The consents of the three next heirs were given on certain conditions. These were shortly, that the petitioner should be permitted to burden the fee of the estate with debt, to the amount of £105,850, and that he should execute a new entail in favour of himself, and certain heirs therein mentioned. A new entail was executed, and power was reserved to burden the estate to the extent allowed. Securities have been granted for debts to the amount of £91,850, and now form valid heritable securities charged on the estate.

The petitioner being desirous to sell a portion of the estate, for payment of the debts with which the fee is burdened, made application to the Court for that purpose—which application was served upon the petitioner's eldest son, who was upwards of twenty-five years of age. By § 25 of the Entail Amendment Act, full power is given to the heir in possession to sell such portions of the entailed estate as the Court may select, for the purpose of liquidating the debts with which the fee is charged and to the application for sale no consents are required. The manner of an application to the Court, when an heir of entail is desirous to take advantage of any of the provisions of the statute, is pointed out by § 33: And no consent is required to a petition such as the present: §§ 34 and 35 regulate the procedure. By § 1 it is enacted that the heir of entail in possession, shall be entitled to acquire the estate, in whole or in part, in fee-simple, if he has the consent of the heir next in succession, being heir apparent under the entail of the heir in possession—"provided always, that such consent to such instrument of disentail shall not be valid and effectual unless granted by a person of the age of twenty-five years complete, not subject to any legal incapacity, and born after the date of the tailzie

to which such instrument applies." Thus, if the heir apparent of the heir in July 13. 1853. possession is in existence at the time when the entail is made, the latter never can be in a position to apply to the Court for leave to disentail. A difficulty therefore arose under § 36 which was reported by the Lord Ordinary (Anderson) for the consideration of the Court. That section provides :—" That it shall not be necessary in any of the proceedings under this Act to call as parties thereto any heirs of entail, other than those whose consent would be required by the heir in possession for the time, to an instrument of disentail; and no heir of entail, other than those whose consent would be required as aforesaid, shall be entitled to appear, or to be heard in such proceedings." If therefore it is necessary under this clause to call any heir of entail, as a party to the present proceedings, it cannot be done, as there is no one whose consent could be given to an instrument of disentail.

Sandford, for the petitioner, submitted that the true meaning of the clause is, that it shall be sufficient in all the proceedings under the Act to call the party whose consent would be required to a disentail. But if there is no one who can consent to a disentail, then there is no one whom it is requisite to call as a party to the proceeding *under the statute*, and that the whole matter is left to the care and superintending power of the Court; see *M'Dougall*, 9th March 1850.

The Court ordered a minute to be prepared embodying the whole facts of the case, and requested the opinions of the whole Court, in the following question :—" Having regard to the terms of the 36 section of the statute, and also having regard to the circumstances of the present case, viz. 1st, That the deed of entail in question is dated after the first day of August 1848; 2d, That no heir of entail whose consent would be required or would be effectual to an instrument of disentail can be called as a party to the present proceedings, no such heir having yet come into existence; 3d, That the proceeding is for the accomplishment of an object to which no consent is required,—whether it is not competent to follow out such proceedings, while no such heir as aforesaid has been or can be called as a party thereto; or whether it is sufficient and necessary to call as parties thereto any of the existing heirs of entail, and if so, which of them?"

To-day the case was advised.

The LORD PRESIDENT, and the rest of the Court expressed their entire concurrence with the consulted Judges, who had also concurred in the opinion of—

LORD RUTHERFURD. The 11th and 12th Victoria, cap. 36, § 25, gives to the heir of entail, in all such cases as the present, a right to sell such part of the entailed estate, with the exception of the mansion-house, offices, and policies, as may be most proper and suitable to be sold, for payment of the charges validly made upon the estate, under no other restriction than that the selection of the portion of the estate to be sold, the sale, the conveyance to be granted, and the application of the price, should all be at sight of the Court of Session. And in this, as in all other cases, the procedure is to be by summary petition, for which the Act, in § 34, provides a special form of intimation and advertisement. The present is not a case in which consent is required; the right is absolutely in the heir, the interposition of the Court being required only to prevent any abuse in its exercise, by selecting a proper portion of the estate for sale, and securing the due application of the price.

July 18. 1853.

Petition, Sir
J. M. Riddell.

Here there are no parties whose consent would authorize disentail, the entail having been made subsequent to the date of the statute, and the next heir in succession, though twenty-five years old, having been born before the date of the entail; and a doubt has arisen whether—as it is impossible to have the parties referred to in the 36th section—the heir in possession has the remedy provided to him by the 25th.

I cannot participate in that doubt. In itself, the object of the 36th section seems clear. Where the parties are in existence whose consent is sufficient to disentail, it seemed plainly unnecessary in any proceedings under the Act, to call any other parties, because these, together with the petitioner, were in truth the proprietors of the estate, entitled to dispose of it at pleasure; and therefore, in any procedure in which they were all present, every recognised interest in the estate was fully represented. Plainly in the same view it was provided, not only that no other parties need be called, but that no other party, these being called, should be entitled to appear. The last part of the clause implies that the parties whose consent is required are in existence. This clause, however, was plainly applicable to the cases only where consent was requisite, or where those parties existed. But where consent was not required, or where it happened that those parties did not exist, the clause had simply no application; and provided the statutory intimation and advertisement are given, the matter is left entirely in the discretion of the Court, to be determined as they think fit. A clause dispensing with the calling of certain parties, and excluding the right of others to appear where those are in existence and called, never could be so construed as to exclude an absolute right vested in the heir in possession.

The question then occurs, whom is it necessary to call—the 36th clause having no application? This is not a case in which, as in a question for trying the validity of an entail, it may be necessary to call all the substitute heirs of entail known or in existence. All that the Court requires towards the exercise of the discretion reposed in it by statute, is to see that the interests in the estate are sufficiently protected. To a certain extent the statute secured that by the publication required in section 34; beyond that everything is left in the hands of the Court. If the petitioner serve the application upon the whole heirs of entail, it does not appear that any possible objection could be taken to the procedure;—if the party or parties upon whom the petitioner has directly served the application do not appear to the Court, in the circumstances of each case, sufficient, the Court, in their discretion, may order service or intimation upon additional parties, just as appears to have been very rightly done in the case of *Macdougall*, where the only party directly called was an infant son of the petitioner himself, and where the Court, doubting whether the estate was sufficiently represented, appointed three of the heirs nearest in succession to be called. The present case is very different indeed, where the party directly called, though son of the petitioner, is next heir of entail, and upwards of twenty-five years of age. I should not think it necessary to call directly any other parties; but whatever may be done in that respect, and which is rather for the discretion of their Lordships before whom the case more immediately comes, I venture to entertain a clear opinion, that there is nothing in the 36th clause to preclude in this case the remedy given by the 25th.

The COURT "in pursuance of the opinion of the whole Judges—Find, that July 13. 1858. it is competent to follow out the present proceeding notwithstanding that no heir of entail whose consent would be required or would be effectual to an instrument of disentail has been or can be called as a party thereto, and that in the circumstances of the present case it is not necessary to call any other party than the heir of entail already called," &c., and remit to the Lord Ordinary.

Petition, Sir
J. M. Riddell.

Smith & Kinnear, W.S., Petitioner's Agents.

(J. S. M.)

PETITION, BARON PANMURE.

No. 253.

11 and 12 Vict., cap. 36, sec. 26—*Entail Amendment Act—Disentail—Consigned money—Authority to uplift—Consents.*—Part of an entailed estate was sold under authority of an Act of Parliament, and the price consigned. Thereafter, the heir in possession obtained authority to disentail, but before executing the deed of disentail, he applied for warrant to uplift the consigned money as belonging to him in fee-simple:—*Held*, that such consigned money was part of the estate for which authority was given to disentail, and that in the application for warrant to uplift it, the consents of the three nearest heirs were not necessary.

This was an application for authority to uplift money, and was reported by the Lord Ordinary, (Curriehill). The petitioner was heir of entail of certain lands, part of which were required for the construction of a railway and also for the purpose of a water company. The amount of composition to be paid by these companies was referred to arbitration, and in 1849, a sum was consigned by the water company as the amount found due by them. And on 21st June 1848, the sum payable by the railway company was also fixed, which sum at the date of this petition was still due.

1st Division.
July 13. 1853.

Petition,
Lord
Panmure.

The petition set forth, that the consents of the three next heirs of entail having been obtained, an application for disentail was lately presented to the Court, who, on 28th January last, interponed their authority thereto. That by sec. 26* of the 11 and 12 Vict., cap. 36, it is, in these circumstances, competent for the petitioner to ask and for the Court to grant authority for payment of such sums of money as those in question as belonging to himself in fee-simple. The petition therefore prayed for intimation to the three nearest heirs in the usual way; and thereafter, on advising the petition with or without answers, to grant warrant for payment to the petitioner of the sums set forth.

* Section 26 provides, "That in all cases where money has been derived or may hereafter be derived from the sale or disposal of an entailed estate in Scotland, or of any right or interest in or concerning the same, or in respect of any permanent damage done to such estate under any private or other Act of Parliament, or where any money has been invested in trust for the purpose of purchasing lands to be settled upon the series of heirs entitled to succeed to such entailed estate, and where such money would fall to be invested in lands or heritages to be entailed on the same series of heirs as are called to the succession of such entailed estate by the tailzie thereof, and under the same prohibitions, conditions, restrictions, and limitations as are contained in such tailzie, and where the heir in possession of such entailed estate could, by virtue of this Act, acquire to himself such estate in fee-simple by executing and recording an instrument of disentail as aforesaid, it shall be lawful for such heir to make summary application to the Court in manner hereinafter provided for warrant and authority, and the Court, upon such application, shall have power to grant warrant and authority to and in favour of such heir of entail for payment to such heir of such sums of money as belonging to himself in fee-simple."

July 13. 1853. This petition was presented subsequent to the interponing by the Court of their authority to the disentail, but before that disentail was executed. The question arose, whether the consents of the three nearest heirs were necessary.

Petition,
Lord
Panmure.

The *Lord-Advocate* was for the petitioner.

The LORD PRESIDENT. When the lands were taken by the railway company and the price thereof consigned or paid, these lands no longer belonged to Lord Panmure. They were severed from the estate. Then a disentail was authorised in January last. The instrument of disentail was not executed when the present application was made, which was on 2d February. At that time, therefore, there was no disentail of the estate although warrant to execute a disentail had been granted. Therefore Lord Panmure had got into that position in which it was competent for him to make such an application to the Court, and I think he was beyond the necessity of obtaining consents, for he was in a position to execute a disentail although he had not done so. There is no difficulty in this. The difficulty I feel arises in this way. The application to disentail was to disentail an estate which no longer contained this portion of it which had been converted into money; therefore that application is not for authority to carry in fee-simple that which forms the subject of the present petition. There lies my difficulty. But it is a narrow point, and I am rather inclined to allow the petition to proceed.

LORD FULLERTON. I do not feel the same difficulty. It appears to me to be removed by the terms of section 26. The heirs of the estate of Panmure having given their consent to disentail, have no interest in being called in this application.

LORD IVORY. I concur. I am not so much impressed with the difficulty intimated by your Lordship. It seems to me that the words *entailed estate* mean not only the estate which survives but that which has been cut out of it. The statute proceeds on the assumption that there has been a severance of one portion of the estate from the other, and that in consequence there has come in room of a portion of it money obtained by the sale of it. In the present application, we have all the conditions required by the statute. The petitioner cannot be more an heir in possession of this money than he is at present.

LORD ROBERTSON concurred.

Gibson-Craig, Dalziel, and Brodie, W.S., Petitioner's Agents. (J. S. M.)

No. 254.

PETITION, MARQUIS OF TITCHFIELD.

Process—Expenses—Railway Company—Completing Titles—Liability.—A railway company are liable for the whole expenses of completing titles to land purchased with money consigned by them as compensation for ground taken for the railway.

1st Division.

July 13. 1853. The Marquis of Titchfield was heir in possession of lands entailed upon him and a series of heirs, by the trustees of the Duchess of Portland. Various portions of these lands were acquired by the Glasgow and South Western Railway Company, who by arbitration were found liable in a sum of £8102, 0s. 8d. of compensation—which sum was consigned in bank. A joint petition was presented by the Marquis of Titchfield and the Duke of Portland, for authority to the Duke to uplift that sum and entail certain lands held by

Pet., Marquis
of Titchfield.

him in fee-simple in favour of the Marquis, as an equivalent for the lands taken from the entailed estate—which petition was granted. The Auditor allowed the petitioners the expense of completing their titles.

July 18. 1853.
Pet., Marquis
of Titchfield.

The *Lord Advocate*, for the railway company, objected to the company being burdened with that expense. The expense of completing titles to a superior does not fall under the Lands' Clauses Consolidation Act, as part of the expenses which the company ought to bear; *Graham v. Caledonian Railway Co.*, 27th Jan. 1848. The expense of a valid entail is all that the company can be called on to pay—not of entry with the superior.

The LORD PRESIDENT. There is not a complete reinvestment without it. The company are undoubtedly liable.

Objection repelled.

Gibson-Craig, Dalziel & Brodie, W.S., Objectors' Agents.

Walker & Melville, W.S., Petitioner's Agents.

(J. S. M.)

M'CUBBIN v. M'GILLIVRAY.

No. 255.

Appeal—Bankrupt—Sequestration—Statute 2 and 8 Vict., c. 41.—In a competition for the office of trustee on a sequestrated estate, an objection having been taken to a vote, the Sheriff granted a diligence for recovery of certain documents relative thereto:—*Held* incompetent to appeal against this interlocutor.

This was an appeal from an interlocutor by the Sheriff-substitute of Inverness, pronounced in a competition between David M'Cubbin and John M'Gillivray, for the trusteeship on the sequestrated estate of Alexander Meldrum. Among the votes given for M'Cubbin was one by John Barker & Sons, who claimed on a bill for £16 : 5 : 7. It was objected on behalf of M'Gillivray, that the debt in this bill was not due to them, inasmuch as they had discounted it at a bank, and at the date of their affidavit the bank was the real holder and creditor; and it was averred that they had merely borrowed up the bill for the purpose of creating a vote, and under an obligation to return it to the bank. Diligence was craved for recovery of bank books and letter of obligation granted by claimants to the bank; but the particular bank not having been condescended on, the Sheriff-substitute, in an interlocutor granting diligence at the instance of both parties against various specified banks for recovery of documents to support different objections, also granted diligence "for recovery of the books of the bank where the bill per £16 : 5 : 7, referred to in the claim of John Barker & Sons, was discounted, that excerpts may be taken from the said books in reference to that bill, and also for recovery of the letter of obligation alleged to have been granted by the said John Barker & Sons to the bank."

Against this interlocutor M'Cubbin presented a note of appeal, in so far as it granted diligence "for recovery of the books of banks not specified where the bill" was discounted, and "for recovery of the letter of obligation alleged to have been granted by the said John Barker & Sons to the bank."

Macpherson, for M'Gillivray, objected to the competency of the appeal. The judgment being an interlocutory one, is not subject to review at this stage, unless under some special provisions of 2d and 3d Vict., c. 41. The object of that Act was to make the procedure as summary as possible, and the

July 13. 1853. *earliest section under which this appeal could be brought is § 54, but it applies only to the Sheriff's deliverance declaring the election of a trustee. There had been no deliverance here: When the deliverance came to be pronounced, it could be brought under review, and along with it the interlocutor now complained of; but it would give rise to intolerable vexations and delays if every judgment from the beginning to the end of a process could be separately brought under review. The only other section which the appellant could found upon is § 128. But it did not apply. The Act is there dealing with different matters from those it was occupied with in the earlier sections: In them it provided machinery for carrying out the Act, and the right of appeal provided in them does not embrace this case. Neither can any construction of § 128 do so consistently with § 54. § 128 allows twenty-one days for appealing any interlocutor not included in § 54, which provides, that the deliverance declaring the election of a trustee shall be final if a note of appeal is not presented in fourteen days. Thus, on the reading contended for, during seven days subsequent to the election of the trustee becoming final, it would be competent to appeal a previous interlocutor, perhaps the very one which led to the election; the deliverance as to which must remain final, though the grounds on which alone it could be supported might be carried away. An appeal at this stage had been dismissed in the recent case of *More v. Slate*, 12th July 1849.*

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McCubbin v.
McGillivray.

Fraser, for the appellant. The appeal is competent under § 128. It will not do to set up a single decision of the other Division of the Court against a practice universally acted upon. In *Rhind v. Mitchell*, 5th Dec. 1846, the Court had no difficulty in allowing the appeal—their difficulty was as to the power of the Sheriff to grant any diligence at all in a competition for the trusteeship. See also *Kerr v. Union Bank*, 22d Feb. 1849. The practice is all against the case of *More*; so too is convenience. If the Sheriff has gone wrong it is far better he should be set right at once than that after much expense, matters should proceed to an election and then the election be set aside. The doctrine on the other side is quite unreasonable; that no matter how irregular or incompetent the proceedings of the Sheriff might happen to be, there is no way of stopping them. No disadvantage could arise to the estate from allowing the appeal, as the statute made ample provision for its interim-management.

LORD IVORY. If parties are to go on taking objections in this sort of way, how is it possible ever to come to the election of trustee?

LORD ROBERTSON. I have heard no answer to Mr Macpherson's argument on § 128. If every deliverance is to be appealed, the estate will be gone before a trustee is appointed. The decision of the Second Division must rule.

The LORD PRESIDENT, and LORD FULLERTON, concurred.

The COURT "Dismiss the appeal as incompetent," with expenses.

John Walls, S.S.C., Appellant's Agent.

Gordon, Stuart, & Cheyne, W.S., Respondent's Agents. (J. S. M.)

BLACK v. CROALL AND OTHERS.

No. 256.

Reparation—Process—Jury trial—Issue.—In action of damages against the proprietors of a stage-coach for reparation for injuries sustained by its overturn, the pursuer libelled many various grounds, each sufficient to infer the liability of the defenders. *Form of issue approved of for the trial of such a case.*

This was action of damages raised by Black against the joint proprietors of a stage-coach, concluding for reparation for injuries sustained by him in consequence of the upset of the coach. He stated a number of very different grounds of liability against the defenders, viz. :—That the coach was of faulty and dangerous construction,—that it was overloaded,—that it was drawn by vicious and unmanageable horses, and driven by the defender's servant at a furious and reckless speed,—that the harness used was old and defective,—and that the time allowed for the stage was far too limited for performing it in safety. He pleaded that, in the circumstances condescended on, and especially in respect that the injuries complained of by the pursuer were the result of, or caused by, the fault, negligence, or want of skill of the defenders, or of others, or another, for whom they were responsible, damages were due.

The Lord Ordinary reported the case, that it might be settled authoritatively by the Court what form of issue should be sanctioned for trying such cases.

The following was the issue approved of:—"It being admitted that, on or about the 8th day of September 1852, the pursuer travelled as a passenger by a stage-coach from Dunfermline to Edinburgh, and that, at the time, the said coach was the property of the defenders,—WHETHER, in the course of the said journey, the said coach was overturned through the fault of the defenders, to the loss, injury, and damage of the pursuer?"

Thomas Ranken, S.S.C., Pursuer's Agent.

Walker & Melville, W.S., Defenders' Agents:

(J. M. M.)

BALFOUR v. WALLACE.

No. 257.

Reparation—Slander—Process—Jury Trial—Issue—Justification.—In action of damages for slander, *form of issue* in justification which was allowed, in the special circumstances of the case, to be admitted to proof in the event of a prior issue in justification being proved,—though it apparently did not precisely meet the matter put in issue by the pursuer.

This was an action of damages for defamation at the instance of Balfour against Wallace. The following were the issues for the pursuer:—"It being admitted that the pursuer is a physician and surgeon, and that in the month of September 1852, he practised as such in Kilsyth, and country around. It being also admitted that upon Monday, the 20th September 1852, the pursuer was called in to visit and prescribe for John M'Kechan, sometime coachman to the defender, and residing in a house near the stables at Auchinvole, who was then unwell, and who died on the afternoon of Wednesday following: WHETHER, on or about the 24th day of the said month of September 1852, the defender, at or near Colzium House, or at or near Auchinvole House, falsely and calumniously stated to Sir Archibald Edmonstone of Duntreath, Bt., that the pursuer had not understood the case of the said John M'Kechan, and that the pursuer's treatment of the case had been marked with gross carelessness, recklessness, and ignorance, and that the pursuer thereby had forfeited all title to

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confidence as a professional man; or used expressions of the same import, to the loss, injury, and damage of the pursuer? WHETHER, on another occasion, between the said 24th day of September, and the 16th day of October 1852, (the precise date being to the pursuer unknown), the defender, at or near Colzium House, or at or near Auchinvole House, falsely and calumniously stated to the said Sir Archibald Edmonstone, that the pursuer, on one or more of the visits which he made to the said John M'Kechan on the forenoon and evening of Monday the 20th; on the morning also about noon, and on the night of Tuesday the 21st; and on the forenoon of Wednesday the 22d September 1852—was drunk, or intoxicated, or perceptibly under drink; and further, that the pursuer, accompanied by Dr Angus M'Gregor of Edinburgh, had gone into the pursuer's house at Auchinvole on the forenoon of said Tuesday, the 21st September, and sat and drank brandy there; meaning thereby that the pursuer and Dr M'Gregor drank brandy to excess on the said occasion,—or did use expressions of the same import, to the loss, &c.? WHETHER, on the evening of the 22d September 1852, the defender within the manse of Kilsyth, falsely and calumniously stated to the Rev. Alexander Hill, the minister of that parish, that the pursuer had been perfectly careless about the said John M'Kechan's case, and ignorant of its character,—or used other expressions of a similar import, to the loss, &c.? WHETHER, on Sunday the 26th day of September 1852, and on other occasions between the 22d day of September 1852, (the date of the said John M'Kechan's death), and the 22d day of October 1852, (the precise dates being to the pursuer unknown), the defender falsely and calumniously stated to Robert Webster of Gavale House, factor to the said Sir Archibald Edmonstone, that the pursuer had been careless about the said John M'Kechan's case, and ignorant of its character,—or used other expressions of a similar import, to the loss, &c.?"

The defender's issues were :—

"WHETHER, on the occasion of a visit which the pursuer made to John M'Kechan, on 21st September 1852; he was the worse of drink, or obviously affected by drink?" and "WHETHER, on or about the 22d day of September 1852, the pursuer was, when proceeding to visit the said deceased John M'Kechan, at or near the dwelling-house of the said John M'Kechan, perceptibly under the influence of drink?"

Millar, and Dean of Faculty, objected to the defender's second issue. His statement on record is, that on the 22d September, the pursuer visited M'Kechan at 11 A.M.; "he promised to return in a short time, but did not do so till about six in the afternoon. He was then, as the defender was informed, and believes, in a state of intoxication. M'Kechan had died about 2 o'clock. But of this the pursuer was not aware when he returned for the purpose of seeing him about six o'clock. He was only made aware of the death, when nearly at his patient's house." The slander, which the pursuer alleges, is, that he was accused of having been drunk on the occasion of his visits to the patient; but an issue to prove that he was drunk in the afternoon of the day, on the morning of which he had paid his last visit, does not meet the slander. It is not a proper issue in justification; See *Lowe v. Taylor*, 16th Nov. 1844.

Logan, contra.

LORD JUSTICE-CLERK, (with whom LORDS MURRAY and WOOD concurred.) July 13. 1858.
 This is so special a case, that I do not think it any departure from the strictness of our rules as to issues, to allow the defender's second issue, supposing him to have proved his first one. I think that proof of his having gone drunk on the afternoon of the 22d, is a good justification of the charge of general recklessness, in the event of the first issue being proved.

Balfour v.
Wallace.

LORD COCKBURN. I cannot agree. This is a justification as to a matter different from that in the libel. I charge a man with being drunk on one day; can I justify by proving he was drunk the day after?

The COURT "approve of the pursuer's issues, . . . and with regard to the defender's issues, allow the first issue for the defender; and in the event of the defender leading evidence, which in the opinion of the Judge at the trial, is sufficient to go to the jury in support of the first issue; allow the defender, in the special circumstances of this case, to lead evidence in support of his second issue."

James Lindsay, W.S., Pursuer's Agent.

Gibson and Hector, W.S., Defender's Agents. (J. M. M.)

PETITION, JOHN WILSON.

No. 258.

Lunatic—Curator—Making up Title—Special Power.—Where a lunatic has succeeded to property, the Court will grant special powers to the curator to make up titles to it only on special cause shewn therefor.

The petitioner was *curator bonis* to Dickie, an inmate of a lunatic asylum: 1st Division. This petition set forth that Dickie had recently succeeded to a small property, July 14. 1853. consisting of a farm and farm-steading, and of certain dwelling-houses and gardens; that no title had been made up to that property in the person of Pet., Wilson. Dickie, and, therefore, praying for special power to the petitioner, as curator, to do so.

LORD IVORY. I do not like the general abstract form in which this petition is presented to us. Is it to be laid down that in every case in which a lunatic succeeds to property his curator is to be authorised, as a matter of course, to make up a title to it without any special reason assigned?

Fraser, for the petitioner, stated that a demand had been made by the superior to enter.

The LORD PRESIDENT. I should like to see evidence produced of this demand before going farther.

The case was accordingly continued for that purpose; and such evidence having been produced, the COURT, in respect thereof, granted the special powers prayed for.

Jollie, Strong, & Henry, W.S., Petitioner's Agents.

(J. S. M.)

ROSE v. HAY, MACDOWALL, GRANT, AND OTHERS.

No. 259.

Bill—Chamber—Suspension and Interdict—Justices—Procurator-Fiscal—Removal from office.—At a statutory meeting of Quarter Sessions, a person was appointed joint procurator-fiscal *ad vitam aut culpam*. The appointment having been afterwards recalled without any *culpa* being assigned, he presented a note of suspension and interdict against the Jus-

tices interfering with him :—Note refused, and *Opinions*, that such an appointment *ad vitam aut culpam* is *ultra vires* and ineffectual.

1st Division. This was a suspension and interdict at the instance of Archibald Young
 July 14. 1853. Rose, solicitor in Banff, against certain Justices of the county, praying to have
 them prohibited carrying into effect a resolution passed in a statutory meet-
 ing of Quarter Sessions, recalling his appointment as procurator-fiscal. The
 complainer set forth, that in 1850 the Justices appointed him joint procurator-
 fiscal *ad vitam aut culpam*—that he has since acted as such, and that no alle-
 gation of *culpa* has been made against him—that at a meeting of the Quarter
 Sessions held in May last, it was resolved that the meeting “recall the ap-
 pointments of Messrs John Colville, Archibald Young Rose, and William Bar-
 clay, as procurators-fiscal for the Justices, and resolve to appoint, and hereby
 do appoint the said John Colville of new, as procurator-fiscal for the said
 lower district, to act for the Justices.” This resolution was carried against
 a contrary motion by a majority of twenty-four to four. Thereupon the com-
 plainer “took instruments in the hands of the Justices of Peace clerk against
 the resolution carried by the meeting, in respect that the said resolution was
ultra vires of the Quarter Sessions—his appointment being not only in itself,
 but declared to be by the minutes of Quarter Sessions, of date the 29th Oct.
 1850, *ad vitam aut culpam*, and there having been no *culpa* brought against
 him to justify the dismissal from office, even supposing such had been com-
 petent,” &c. He pleaded, that in any view it was incompetent for the meet-
 ing in question, by a majority *de plano*, to deprive him of the office.

Answers were lodged for the respondents, who pleaded that the appoint-
 ment *ad vitam aut culpam* was *ultra vires* and illegal, the Justices being bound
 at each Quarter Session to elect a properly qualified person to the office of
 procurator-fiscal, or *continue* the former procurator-fiscal—1661, cap. 38 ;
 and at any rate, they were prepared to shew reasonable cause for what they
 did. And even if such appointment were good during the subsistence of the
 powers of Justices acting under the Commission of the Peace, by whom such
 appointment was made, it fell in consequence of the issuing of a new com-
 mission, which operated as a recal of the powers of the Justices acting under
 the former commission.

The Lord Ordinary (Deas) “passes the note, and grants interim-interdict as craved.”

In a note his Lordship stated, “If there be no illegality or incompetency
 in appointing a Justice of Peace fiscal *ad vitam aut culpam*, it would be diffi-
 cult to hold that the complainer has been regularly removed on the ground of
culpa. The Lord Ordinary does not think he can assume the illegality or in-
 competency of such an appointment to be so clear as to entitle him to refuse
 to maintain the complainer in possession of his office by an interim-interdict
 till the question shall be tried on the passed note. On grounds of expediency,
 the Lord Ordinary sees no sufficient reasons why Justices of Peace should
 appoint their fiscals *ad vitam aut culpam* any more than Sheriffs, who usually,
 if not invariably, appoint their fiscals during pleasure. But this does not
 solve the question of power. It is said, that because Justices do not them-
 selves hold life appointments they cannot appoint their officers for life. The
 Lord Ordinary thinks this a *non sequitur*. Neither is he prepared to assume,

without further argument, that when a new commission of the Peace is issued, July 14. 1853. all appointment of officers by the former Justices necessarily fall. The whole matter deserves grave consideration; but the respondents cannot reasonably complain, that in the question of interim-interdict they are not at once assumed to have the power, without specific *culpa* assigned, and without declarator, or other legal process, to supersede the complainer in the exercise of an office, which he has been allowed to hold, upon the footing of a life appointment since October 1850." Rose v. Hay, &c.

The respondents reclaimed, for whom—

Gordon, and the *Dean of Faculty*.

Penney was for the complainer.

THE LORD PRESIDENT. This is a peculiar case, and involves many considerations. I must say I have great difficulty in holding that the appointment of a procurator-fiscal *ad vitam aut culpam* is such as he now maintains it to be. My difficulty arises very much from the contrary practice in Sheriff-Courts; and in my view practice goes very far as to the nature of the office. I do not go along with the argument that the whole appointments made by one commission of Justices fall on the expiry of that commission. This is an appointment at pleasure, which continues so long as a different pleasure is not intimated. But I do not think this is a proper form in which to try the question. A declarator might be brought, and, therefore, unless the suspender should agree to this note being passed without the interdict, I would be inclined to refuse the note altogether.

LORD FULLERTON. I am of the same opinion. An appointment *ad vitam* must be constructively held to be an appointment on the usual terms. But I go farther, and think that it was the act of a particular commission, and that their successors are bound by that act, only in so far as it was consistent with their usual powers, and no farther. This is certainly a most inconvenient form for trying the question. I do not think there is such a *prima facie* case made out as to lead us to pass the note and grant interdict.

LORD ROBERTSON. I took it for granted at first that the party having such an appointment was entitled to be supported in his office till the discussion was concluded. But I am much moved by what has fallen from your Lordship. If the Justices have no power to grant such an appointment that is another matter.

LORD IVORY. The best way is to refuse the note. This is not the proper form for trying the question. It can only be tried in a declarator. I am of opinion that the Justices have no power to make an appointment *ad vitam*, so as to embarrass their successors. It must just be held to be extended by implication. The practice in the Sheriff-Courts corroborates this view. Farther, as this is a criminal matter, I have doubts whether this is the proper jurisdiction for dealing with it. If the process were a declarator it might be different. But the clearest ground of all is, that this person cannot continue to act without finding caution, and no offer of caution is made. On the whole, therefore, so far, at any rate, as the Bill-Chamber goes, I think the suspender is substantially wrong.

Note refused.

Wotherspoon and Mack, S.S.C., Complainer's Agents.

Webster and Renny, W.S., Reclaimers' Agents.

(J. S. M.)

No. 260.

LOCKHART v. LOCKHART.

Act 5 Geo. IV., cap. 87—Aberdeen Act—Provisions to younger Children—Faculty—An heir of entail granted provisions to his younger children on the narrative of the powers conferred by the Aberdeen Act to grant such provisions. The maximum amount which could be granted under that Act had already been exhausted by previous provisions under the entail, which contained power to grant provisions to the extent of three years' rent, after deducting the interest of prior provisions :—Held, that the provisions so granted on the narrative of the statute, although null under the Act, might yet be sustained as a valid exercise of the powers contained in the entail :—Observed, that the misrecital of a power, or the recital of a wrong power will not make the exercise of the power bad if the power which is exercised actually exist.

1st Division.

July 15. 1853.

Lockhart v.
Lockhart.

This action was instituted by the guardians of the younger children of the late Sir Norman Macdonald Lockhart, against his eldest son, as the heir of entail succeeding him in his entailed estates of Carnwarth, Dryden, and others, for payment of provisions granted by him to these younger children, in virtue of the powers created by the Act 5th Geo. IV., c. 87. The deeds granting these provisions were Sir Norman's contract of marriage and supplementary bond of provision. These provisions were equal to three years' free rental, being £23,101, 5s. By the entails of Carnwarth and Dryden, power is reserved to the heirs to grant provisions to the extent of three years' rent, after deducting the interest of previous provisions. At the date of the documents making the provisions to Sir Norman's children, there were resting-owing prior provisions to the amount of £53,371, being more than three years' free rent of the estate, and at Sir Norman's death these were still unpaid. The provisions granted by Sir Norman proceeded not on the narrative of the exercise of the powers reserved by the entail, but on the narrative of the statute : In these circumstances, it was objected that the provisions were null and void, in respect that at the time they were granted, and even at the time of Sir Norman's death, the three years' rents which formed the *maximum* amount of the provisions which could competently be made under Lord Aberdeen's Act in favour of younger children, had already been exhausted by these prior provisions.

The case was reported by the Lord Ordinary, (Curriehill), who stated in his note that the case was an amicable suit ; but that this objection raised a question of general importance, and which does not appear to have been decided. The objection is founded upon the enactments in §§ 6 and 12 of Lord Aberdeen's Act. By § 6 it is enacted, "*That where the powers hereinbefore contained, of granting provisions to a child or children, shall have been exercised by one or more heir or heirs in possession of any such entailed lands and estates as aforesaid, to the full extent of three years' free rent or value of the entailed estate as aforesaid, it shall not be in the power of any heir in possession of the same lands and estate to grant farther provisions to his or her child or children till some part of the provisions granted to the extent of three years' free rent or value as aforesaid shall have been paid or extinguished.*" But this section, at all events, does not appear to support this objection ; because it operates only in cases in which prior provisions to the extent of three years' free rent are granted under the powers *conferred by the Aberdeen Act itself*. But none of the prior provisions upon which the objection in this case is founded had

been granted under the powers of that statute. All of them had been granted ^{July 15. 1853} in virtue exclusively of powers derived from the reservations or exceptions in the deeds of entail themselves. By § 12 of the statute, it is enacted, that the power of any heir of entail in possession, in virtue of the deeds of entail to make such provisions, should not be diminished by that Act, "but it shall not be lawful in any case to grant any such provision as is hereinbefore authorised to be granted in addition to any provision authorised to be granted to a wife, or to a child or children, under any deed of entail, so as to exceed on the whole the proportions of the yearly rent or yearly value of any entailed estate hereinbefore mentioned, and authorised to be granted, for making such provisions as aforesaid." And it is maintained for the defenders that, according to its true meaning, this section disables any heir of entail from granting additional provisions in virtue of the statutory powers, when the already existing provisions granted by former heirs under the powers of the deed of entail, are equal to three years' free rent of the estate. The words, it is argued, are so broad as to make the disability operate in every case in which provisions under the powers of the entail of the specified amount may have been granted, either by the heir of entail in possession or by his predecessors. . . . After full consideration, the opinion the Lord Ordinary has formed is, that although the subsistence of the provisions which were granted by prior heirs, under the powers in two of the entails, must diminish the amount of the provisions granted by Sir Norman under the powers in the statute, these latter provisions are not thereby rendered altogether null and void. The ground of this opinion is, that while the leading enactment in § 4.* fully empowered him to grant the provisions, the disabling clause, § 12, when read in connection with that leading enactment, does not apply to such provisions as those in dispute." . . . The disabling effect of § 12 contended for, his Lordship was of opinion, was not produced; for the first part of that section "is merely a saving clause reserving the right of every heir in possession to grant provisions to the full amount authorised by the entail, if these should exceed the amount authorised by § 4 of the statute. Nor does any such effect appear to be produced by the latter part of this section, because *it clearly does not interfere with the power conferred by § 4 upon the heir in possession, to the extent at least to which that heir is authorised by the entail itself to provide for younger children.*"

* By § 4 it is enacted, "That it shall and may be lawful to the heir of entail in possession of any such entailed estate as aforesaid, to grant bonds of provision or obligation, binding the succeeding heirs of entail in payment, out of the rents or proceeds of the same, to the lawful child or lawful children of the person granting such bonds or obligations, who shall not succeed to such entailed estate, of such sum or sums of money, bearing interest from the grantor's death, as to him or her shall seem fit, provided always that the amount of such provision shall in no case exceed the proportions following, of the free yearly rents or free yearly value of the whole of the said entailed lands and estates, after deducting the public burdens, liferent provisions, including those to wives or husbands authorised to be granted by this Act, the yearly interest of debts and provisions, and the yearly amount of other burdens, of what nature soever, affecting or burdening the said lands and estate, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or yearly value thereof as aforesaid, to the heir of entail in possession, (that is to say) for one child, one year's free rent or value; for two children, two years' free rent or value; and for three or more children, three years' free rent or value in the whole."

July 15. 1853. *Duff*, and the *Dean of Faculty*, were for the pursuers.

Ross, for the defenders.

Lockhart n.
Lockhart.

The LORD PRESIDENT. The question raised on the facts before us, are, (1.) Whether under these circumstances there was power given under the statute to grant any provisions; and, (2.) If not, can these provisions which were granted in the professed exercise of statutory powers, be supported as the exercise of powers given by the entail? These questions are essentially different. They not only relate to powers derived from different sources, but the solution of them depends on different elements,—the first on the reading of the statute, the second on the reading of the deeds. First, Can they be supported as the exercise of statutory powers? This statute proceeds on the principle that some heirs of entail have not power to grant provisions. Now *prima facie*, one would say that the statute had little applicability to the present case. It goes on to state in broad terms, that it shall be competent for an heir of entail to make provisions for widows and children to a certain extent. Anything done under the statute is the immediate exercise of that power. The limit to which the power is to be exercised is a different matter. Now the power given is to make provisions to the extent of three years' rental. The statute contemplates that there may be previous provisions, and in § 4 makes no distinction as to whether these prior provisions were granted in the exercise of the powers of this statute or under the entail; for it contemplates that the statute shall be put in exercise although there are prior provisions. The existence of prior provisions therefore does not exclude the giving provisions in terms of the statute.

The second question is, does the extent of the prior provisions affect the exercise of this power? Now, there is under § 6 a limit dependent on the extent of the previous provisions, but it is of a very peculiar kind; and I think the words of it apply to provisions previously granted in the exercise of the powers of this statute. The object of that section is, that parties shall not use this statute for the purpose of burdening the estate more than to the extent of three years' rental at one time. Then we come to § 12, and that consists of two parts which may be said to be counter-parts of each other in some respects, for they are intended to make more clear that this statute is not intended to limit any larger powers that previously existed. Now I can understand that if under the entail a child had been provided with two years' free rent, that you could not have added to that provision under the statute so as to exceed the measure provided by statute. The question here is not in regard to addition; for there was here no previous provision made by a party exercising this statutory power. I think that is a sound reading of the statute. But, further, I do not think that the reference in the provisions to the statutory powers to grant them is such as to prevent these provisions being supported as the exercise of a power which belonged to the proprietor of the entailed estate. (1.) The proprietor of the entailed estate, as such, required no narrative of his entail at all. (2.) The only objection then, would be, that he has narrated the statute, and that he was acting in the exercise of the powers of the statute, and, therefore, that it is not to be presumed that he was exercising his ordinary powers under the entail. I do not think that is to be inferred, if his ordinary powers did not require any narrative of them. I think there

was a reason. My view is, that the heir of entail had it both ways. (1.) July 15. 1853. He required to refer to the statute to some extent in order to make the provisions he was making, for he was embracing the rental of estates which he could not reach but through the statute. But if he had the power both ways, there was another reason for referring to the statute, for it indicates an intention to exercise his power with reference to the mode of estimating the free rental which the statute provides. But I am further of opinion that, suppose it to be held that the statute gave no power here at all, we would not so rigidly construe the narrative of the deed, that because he did not set forth the powers he unquestionably possessed under the entail, he could not be held to be exercising them in what he did. Therefore I think the provisions ought to be sustained.

Lockhart v.
Lockhart.

LORD IVORY. I take the same view. On looking to the terms of the deed I do not think it is limited to the statute; but even if it had been more doubtful, the misrecital of a power, or the recital of a wrong power, will not make the exercise of the power bad if the power which is exercised actually exist.

LORDS FULLERTON and ROBERTSON concurred.

The COURT "Find that the provisions in question have been validly granted under the Act 5th Geo. IV., c. 87, subject to the deductions specified in the said statute," &c., "assolzie the defender, and find no expenses due.

Bell & McLean, W.S., Pursuer's Agents.

Mackenzie & Baillie, W.S., Defender's Agents.

(J. S. M.)

LISTON v. MACKINTOSH.

No. 261.

Act 1695, c. 41—Act 2 and 3 Vict., c. 41, § 11—*Bankruptcy—Claim—Ranking—Decree cognitionis causa tantum.*—Held, that a decree *cognitionis causa* is sufficient evidence of debt to entitle a party claiming to be ranked on a bankrupt estate for the amount contained in such decree to have his claim investigated, and a dividend set apart for him until such investigation is completed.

This was an appeal in the sequestration of Robert Henderson, an individual 1st Division. partner of the firm of Alexander Liston and Company, and now deceased. July 15. 1853. The appellant, Alexander Liston, at the meeting for the election of interim factor claimed to be ranked and to vote on a claim of £3036, 10s. This claim was not supported by any vouchers of debt further than an extract decree *cognitionis causa tantum*, against the next of kin of the bankrupt upon a charge of twenty days, in terms of the statute 1695, c. 41, and in which they had renounced the succession. That action had been instituted before the sequestration was awarded; but decree was not pronounced till after the date of the sequestration, and intimation had been made to the trustee before the decree was taken. The trustee rejected the claim *in toto*, on the ground that the production of such a decree does not prove the debt, in terms of sec. 11 of the 2d and 3d Vict., c. 41, and that further evidence could not be received, in respect that the claimant neither produced with his oath such accounts and vouchers as are necessary to prove the debt, nor stated in his oath the cause why the same was not produced. He also stated in his deliverance that the debt was not due, and that the books and other vouchers in the

Liston v.
Mackintosh.

July 15. 1853. claimant's possession belonging to the concern of Liston and Company had been refused him to enable him to check the sum claimed in the decree. That decree had been on one occasion exhibited to him, and also at a meeting of creditors, but was never allowed to remain in process. Against this deliverance Liston appealed. While he admitted that the trustee, in terms of sec. 104 of the statute, was entitled to call for farther evidence in support of the claim, and offered accordingly to go into such an investigation, he maintained that a decree *cognitionis causa*, (which in the statute 1695 itself is held to constitute the debt,) is, *per se*, sufficient *prima facie* evidence to support his affidavit, and that since the decree in this case is challenged by the trustee, a dividend ought to be set apart for him until it be ascertained whether that decree shall be supported by sufficient grounds and warrants.

Liston v.
Mackintosh.

The Lord Ordinary, (Curriehill,) "repels the reasons of appeal, and dismisses the appeal. . . . Finds the appellant liable in expenses," &c. His Lordship rested his judgment on the case of *Turnbull v. M'Naughton*, 27th June 1850, which he held established the principle that such decrees *cognitionis causa*, "without any voucher in support of the same, are not vouchers sufficient to comply with the statute."

Liston reclaimed, for whom—

Penney argued, that the question is left open by the judgment in the case of *Turnbull*; because, (1.) in that case the decree of cognition was invalid, not having been preceded by such a charge as is required by the statute 1695; and, (2.) because the question in that case related to a claim with a view to voting.

Young, for the trustee, maintained, that although the claimant might be entitled to get into an investigation, he was not entitled to be ranked. He is at all events excluded from the first dividend.

LORD FULLERTON. I do not say that this decree is complete proof of the debt; but I think it is such *prima facie* evidence as to allow the party to prove his case.

The LORD PRESIDENT. I take the same view. The contention of the trustee now is, that the claimant is excluded so far as regards the first dividend. He says he called for evidence of the debt and it was refused. In that state of matters a question of expenses may arise; but the trustee does not state in record what is explicitly set forth in his deliverance, that the debt claimed is unsupported by any legal evidence, and that he has been refused the books and other vouchers in the claimant's possession to enable him to check the sum claimed in the decree. I cannot take it that there was such a refusal, for the trustee now shrinks from that statement. Therefore we are brought to this point,—did the claimant make such a production as entitled him to get into an investigation of his claim? I think the production of this decree was enough. It was all he could give in the circumstances, and I think that a party who has not produced enough to entitle him to vote for a trustee may yet have produced enough to entitle him to get into an investigation of his claim. The statute contemplates that a party may supplement his evidence afterwards. If it had not been for the case of *Turnbull*, I would not have thought it worth while to say anything on the subject. No doubt the repre-

representatives of the deceased do not appear, and this may be a random decree, ^{July 15. 1853.} but it is a decree as a step against the estate of the deceased, and, in the circumstances of the case, it is in a better position than a decree of constitution ^{Liston v. Mackintosh.} generally is. I see no objections stated to it on record. In that respect it differs from the case of *Turnbull*. There is also an important distinction as regards the stage of the procedure at which the question arose. In no view are we tied up by the case of *Turnbull*. The party here did produce sufficient evidence to entitle him to get into an investigation, and to have a dividend set apart until this investigation takes place.

LORD IVORY. On the whole matter, that is the view I am inclined to take of it. With reference to the case of *Turnbull*, it is fortunate that this case is not so precisely like it as to render it necessary to deal with it; but I may say there are doctrines there so broad that I should hesitate before giving them my adhesion.

LORD ROBERTSON concurred.

The COURT "recal the interlocutor of the Lord Ordinary reclaimed against, and the deliverance of the trustee appealed from: Find that the appellant is entitled to have the state of accounts between himself and his deceased partner investigated: Remit to the Lord Ordinary to proceed to such investigation, and in the meantime to set apart a dividend corresponding to the amount of the appellant's claim, to abide the result of such investigation: . . . Find the appellant entitled to his expenses against the estate," &c.

Gibson-Craig, Dalziel, & Brodie, W.S., Reclaimers' Agents.

William Hunt, W.S., Respondent's Agent.

(J. S. M.)

MACONOCHIE, (GRAHAM'S CURATOR.)

No. 262.

Curator bonis—Judicial Factor—Pupils' Protection Act, sec. 7 & 8—Special Powers.

This was an application by the curator under the 7th and 8th sections of 2d Division. 12 and 13 Vict. cap. 51, for special powers—(1.) To thin the plantations ^{July 15. 1853.} and growing timber on the estate of Airth; and (2.) To sell certain portions of the wine in the cellar at Airth castle, which were becoming deteriorated ^{Petition. Maconochie.} through age. The opinion of the accountant of Court was produced, recommending that the powers should be granted—and reports from skilled persons were also produced, showing the necessity of the thinning, and of the sale.

Lord Deas was about to report the application in terms of the statute, when—

LORD JUSTICE-CLERK stated that it was unnecessary, as the Court were of opinion that the powers sought were such as fell within the ordinary administration of the curator. "This is not an application to borrow money for the improvement of the estate, or anything of that kind, and the curator must just thin the wood and dispose of the wine as seems most expedient to himself."

The other Judges concurred.

Menzies, and Macconochie, W.S., Agents.

(J. M. M.)

No. 263.

HAMILTON v. DUNN.

Superior and Vassal—Non-Entry—Composition—Assignee—Singular Successor.—In the feu-contracts of certain lands, dated in the middle of the 17th century, the entry of "assignees" was taxed at a certain sum. In an action to compel the defender, a singular successor of the vassals last infeft in the lands, to pay a year's rent for his entry,—*Held*, that according to a fair construction of the particular terms of the original feu-contracts, the term "assignees" meant singular successors, and not merely assignees to the open precepts before infeftment; and, therefore, that the defender was entitled to his entry on paying only the taxed amounts.

2d Division.

July 16. 1853.

Hamilton v.
Dunn.

The present was an action of reduction-improbation and declarator of non-entry, raised by Hamilton of Barnes, the predecessor of the present pursuer, against William Dunn of Duntocher, who is now represented by the present defender, the object of the action being to try the question, whether the defender, admittedly a singular successor of the vassals last infeft, was bound as such to pay a year's rent on his entry to certain lands held by him of the pursuer; or whether he was entitled to enter on payment of certain taxed compositions specified in the charters as payable on the entry of "assignees."

The parcels of land as to which the question arose were three, viz., 1st, The 25s. land of old extent of Easter Kilbowie; 2^d, The half of the 32s. 6d. land of old extent of Wester Kilbowie; and, 3^d, The lands of Milton of Duntocher and Poffle of land called the Miln croft.

The lands of Easter Kilbowie were originally disposed, on 16th November 1643, under a contract of feu between R. Hamilton of Barnes and William Brock, whereby Hamilton, the superior, "dispones, and in perpetual feu-farm heretably and irredeemably letts and demitts to the said William Brock, his aires and assignees whatsoever, all and hail," &c. The obligation to infeft was "to duly and validly infeft and sease the said William Brock and his foresaids therintill, and that by ane sufficient feu-farm charter containing precept of seisine, with seisine to follow thereupon, to be holden of the said Robert Hamilton," &c. The clause as to the entry of vassals was thus expressed:—"Farther, the said Robert Hamilton binds and obliges him and his foresaids, to enter, admitt, and receive the airs and successors of the said William Brock and his foresaids, immediate tenants and vassals in and to the foresaid twenty five shilling land, with the teinds and pertinents, for payment to be made by them of the sums of money aftermentioned, viz., by ilk air at his entry, the sum of five merks money; and by ilk assigney to whom the said lands, with the teinds and pertinents, shall happen to be disposed in hail or in part, ten merks money."

The lands of Wester Kilbowie, of which the second parcel now in dispute is the half, were originally feued out by Hamilton of Barnes, under a feu-contract and relative charter, both dated 11th August 1659; by the first of which deeds Hamilton conveys to Moreesoune, the vassal, "his aires and assigneys quhatsoever, all and heall," &c., and binds himself "to enter, admit, and receave ye aire or aires of the s^d Robert Moreesoune, or his foresaids, heretable vassals and tenants in and to the foirnamed landis, with the personag teinds y^of therein includit, and heall pertinents of the samyne respective above wryttinè, extending, lyand and occupied as said is (exceptand and reservand as is above excepted and reservat), for payment of the soume

of three pund fyve shilling money foirs^d, to be payed be ilk aire or aires in July 16. 1853. the first yeire of y^r. entrie y^rto, without any farder compositionè or satisfacti-
 one y^rfor in any sort ; and that be precept of clare constat, or utherways, Hamilton v.
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 in the best manner and forme that for the time may or can be devysed ; and sicklyke the said Robert Hamiltoun, be y^e tennor hereof, binds and obligies him and his foirsaidis to enter, admit, and receave the assigneyis, ane or mae, of the said Robert Moreesoune, or his foirsaidis, heritabill vassals and feu ferme tennentis, in and to the heall foirnamed landis, teinds and uthers, with their pertinents respectivè above wryttane, or anie part y^rof, for payment of the soume of sex pundis ten shillings money foirs^d, to be payed by ilk assigney in the first yeire of their entrie y^rto, without any farder compositionè or satisfacti-
 one to be given therefor in any sorte, and either be chartours of confirmatioune, or utherways, as cane be best devysed."

The original feu charter of the lands of Milton of Duntocher, and Poffle of Miln crofts was not forthcoming in this process, but it was admitted by the parties that it was dated about the same period as those of the other two parcels, and that in its absence its terms must be presumed to have been conformable to the recent charters by progress transmitting the feu. Two of these were produced in process, and by the oldest of them it was declared, that the said lands "are holden of me, as immediate lawful superior of the same, in feu farm, fee and heritage, paying yearly therefore, the said Isobel Spreull, her heirs, assignees, and successors to me, the said John Hamilton, my heirs or assignees, the sum of three pounds Scots of yearly feu-duty at Martinmas, and the double of the said feu-duty, the first year of the entry of each heir, and the sum of twelve pounds Scots the first year of the entry of the assignees of the said Isobel Spreull, or her foresaids, to the haill lands and teinds before mentioned." There was indorsed upon a charter in these last mentioned lands, granted in 1813, in favour of a singular successor, a receipt for £12 Scots of entry-money as paid by the vassal.

The pursuer maintained that, as the defender was admittedly a singular successor, he was bound to pay a year's rent on his entry as vassal in each of these three parcels of land, and that according to the legal construction and interpretation of the deeds in question, the term "assignees" therein employed, referred solely to assignees to the open precepts before infestment, and could not apply at all to the case of the defender, who took the right of a singular title, after it had been feudalized in the person of the original vassals, or of those deriving their right immediately from them. The defender, on the other hand, maintained, that as the original feus were granted in favour of the vassals and *their heirs and assignees*, and, as by the terms of the feu-contract, the entry of *each assignee* was taxed at a certain sum, the defender was, as being an assignee in the sense of the feu-rights, entitled to an entry as such.

The Lord Ordinary (Wood) "Finds that the entry of singular successors in the lands of Easter Kilbowie, and in the lands of Milton of Duntocher, and Poffle called the Miln croft, is not taxed : Finds that the entry of singular successors in the half of the 32s. 6d. land of the lands of Wester Kilbowie is taxed," &c.

Both parties having reclaimed,—

July 16. 1853. *G. G. Bell, and Dean of Faculty, were for defender.*

Baillie, and H. Robertson, for pursuer.

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The arguments of the cases referred to in support thereof, will all be found noticed in the opinions of the Judges.

The LORD PRESIDENT and LORD FULLERTON were of opinion that the interlocutor should be adhered to as to the entry to the lands of Easter Kilbowie and Milton, and Poffle of Miln croft; but should be altered as to the entry to the lands of Wester Kilbowie. On the other hand—

LORDS CUNINGHAME and IVORY were for adhering as to the lands of Wester Kilbowie; and altering as to the entry to the other parcels, which they were of opinion was taxed.

The Court, being thus equally divided, requested the Judges of the Second Division and permanent Lords Ordinary to state in writing their opinions on the two following questions, viz.; 1. Whether the interlocutor of the Lord Ordinary ought to be adhered to or altered as to the entry to the lands of Easter Kilbowie and Milton of Duntocher, and Poffle called Miln croft; and, 2. Whether it ought to be adhered to or altered as to the entry in the half of the 32s. 6d. land of Wester Kilbowie.

LORD DEAS. I am of opinion—1st, That the interlocutor of the Lord Ordinary ought to be altered as to the entry to the lands of Easter Kilbowie and Milton of Duntocher, and Poffle called the Miln croft; and 2d, That his Lordship's interlocutor ought to be adhered to as to the entry in the half of the 32s. 6d. land of the lands of Wester Kilbowie.

All the authorities agree that in a question of this kind effect must be given to the intention of parties if clearly expressed, although the presumption is, *in dubio*, against taxation. Accordingly all the cases seem to have been decided with reference to the terms of the particular titles. In the cases of *Salmon v. Boyd*, 25th July 1751, Mor. 4181; and *Elchies, voce* "Superior and Vassal," No. 13; and of the *Magistrates of Inverness v. Duff*, 2d Feb. 1769, Mor. 15,059; and in the unreported cases of *Sir William Hamilton v. Earl of Lauderdale* in 1788; and of the *Duke of Queensberry v. Smith*, 15th Feb. 1792, the words, "*prout usus est feodifirma*," or "as use is of feu-farm," attached to the reddendo clause, which stipulated double feu-duty for the entry of heirs and assignees, may of themselves have, reasonably, been deemed sufficient to limit the term assignees to assignees before infestment. In the leading case of *Salmon*, the report shews that the argument upon these words was prominently stated. The unreported case of *Mercer v. Grant*, 13th June and 18th Nov. 1790,—(See opinions of Judges given in Baron Hume's Session papers)—in which the Court were much divided in opinion, is admitted to have been compromised. In the case of *Brisbane v. Sempill*, 6th June 1794, Mor. 15,061; the scoring of the blanks and the terms of the testing clause left no room for holding that parties intended the entry to be taxed. In the case of *Thomson*, 22d May 1810; the words fixing the sum to be paid were applicable only to the entry of heirs; and the interlocutor of Lord Newton, adhered to by the Court, expressly bore, "That it does not appear to have been in the contemplation of parties to limit the composition due on the entry of singular successors in any shape." In the case of

M'Lachlan v. Tail, 14th May 1823, the charter taxed only the entry of "heirs July 16. 1858. and successors," which words might fairly be held to be used synonymously; but it does not follow that the same judgment would have been given on the terms of the disposition, had that deed not been superseded by the charter. ^{Hamilton v. Dunn.} On the other hand, in the unreported case of *Ogilvy v. Kincaid*, 13th January 1780, where the charter bound the superior to receive heirs and assignees of the grantee on payment of double feu-duty, the entry of singular successors was held to be taxed. The words of the disposition which preceded this charter, (supposing these to have weighed with the Court,) were nearly identical with the words which occur here in the feu-contract of Wester Kilbowie. The case of *Ogilvy* is thus, in any view of it, a precedent for holding the entry to Wester Kilbowie to be taxed. But the intention of the superior to tax the entry of singular successors appears to me to be equally clearly expressed in reference to Easter Kilbowie, as to which he stipulates that there shall be paid by "ilk heir," at his entry, five merks, and by "ilk assigney," to whom the lands may be disposed, ten merks. As regards Milton of Duntocher and Poffie, the original titles of which have not been recovered,—but in which a singular successor was entered in 1813, on the footing of the entry being taxed,—neither party has contended for any distinction between these lands and the lands of Easter Kilbowie. In all the three sets of titles, the composition stipulated for assignees is double that stipulated for heirs—a difference not likely to be made if the granter had contemplated only assignees before infestment;—and in all of them the reddendo clause, besides referring to the assignees of the grantee, refers also to the assignees of "*his foresaids*," who could not well be the assignees of an heir uninfest at a period when precepts of sasine fell by the granter's death, as they did at the dates of the feu-contracts, both of Easter Kilbowie and Wester Kilbowie in 1643 and 1669. Taking the whole phraseology used into view, I arrive at the result, that the intention to tax the entry of singular successors is sufficiently expressed as regards all the lands now in dispute.

LORD JUSTICE-CLERK. I concur with Lord Deas in the result stated in the outset of the opinion prepared by him, viz., of refusing the reclaiming note of Mr Hamilton, (now Miss Hamilton), and of altering the interlocutor, so far as complained of in the reclaiming note for Mr Dunn. I wish to state, that I am not disposed to attach the same degree of weight to any evidence of supposed intention. Of course any conclusion would be erroneous which militated against either the declared or the plain intention of parties. But I deal with the case as matter of mutual contract, and of a contract of a very onerous character. The contract in each case is for an heritable right and interest bought and sold, it must be presumed, for value satisfactory to the seller. The taxation of the entry of assignees is a most valuable condition of such heritable estate. These clauses occur also,—not in the dispositive clause, but in the appropriate clause for taxing the entries of heirs and of assignees. In such a deed, I must give full effect to the terms employed in the manner and to the extent which alone will satisfy their introduction—seeing that one party has a clear interest in that principle of construing the contract, and that a more narrow and limited operation of the terms employed restrains their meaning in a way contrary both to the technical and the fair construction of

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the terms in an onerous deed, apart from presumptions. The plea of the superior is founded on presumed intention, with a view to limit the operation of terms employed in feu-rights, which otherwise would clearly lead to the result contended for by the vassal. Now, the clauses in question being an important part of onerous contracts, it lay with the superior to exclude the right which the general words would otherwise give. And that not being done, I hold that it was part of the contract in each case to tax the entry of assignees. The ordinary rule as to assignees before infeftment, which I admit to the full extent in the case to which it properly applies, called the more on the superior to take care that the clause as to the taxation of the entry of assignees was worded in conformity with that special rule, if such was the contract of parties. While on the other hand the terms of the clauses appear inexplicable on such a supposition. Accordingly, the superior contends that their application must be restrained, or at least defined by the presumptions on which he relies. I cannot adopt any such principle of construction. I very much doubt whether the terms of the feu-rights in other cases have not been made to bend too much to the presumptions of intention drawn from certain rules—the application of which ought to be limited to the case which they assume as the proper state of the facts—assignees before infeftment. I am desirous to make an addition to the above opinion. To the exposition of the law contained in the opinion of Lord Curriehill I subscribe without much qualification—except as to the proposition which he thinks deducible from the authorities, viz., that term assignees (if I collect the result correctly of his opinion), *could not*, at the date of these feu-rights, legally, in any clause of a feu-right, mean or include any other assignees than assignees before infeftment. Up to that point I concur cordially in the exposition of the former state of the law, and should regret if it were thought that I intended to express any doubt on the matters therein set forth. But the fact that the law so stood, makes any condition or arrangement in a feu-right for the taxation of the entry of assignees only the more important. When the superior consented to receive them, he was in use, by the practice of the country, to demand certain compositions—which were generally of certain fixed sums, and which, in the ordinary case, he was glad to get in the 17th century—although sometimes the superior still stood on his strict right. When, then, a feu-right was granted with the appropriate clause for taxing the entries of assignees in an onerous contract of this description, I must hold that this very subject had become the matter of adjustment and bargain between the parties, just because the law excluded assignees except with the superior's consent. And when the clause taxing entries fixed a certain definite sum for the entry of assignees, that clause becomes, in my opinion, the more important and significant, precisely because without such adjustment by consent and bargain the assignee could not have obtained his entry. The more the state of the law is considered, the more important and significant becomes the clause, taxing generally and plainly during the currency of the feu-right as a permanent arrangement, the entry of heirs and assignees. This is the result I deduce from the general state of the law, as explained by Lord Curriehill; and I am desirous to make this explanation, which ought to have entered my former opinion, that it may not be thought that I had overlooked such important points. Of course the


clause, to receive effect, must unequivocally apply to the entry of assignees, July 16. 1858. else there is no ground for the conclusion that the entry of assignees was subject of contract and adjustment. Thus, in the case of *Thomson*, 22d May 1810, the clause was simply that the superior bound himself to receive the *heirs and successors* of the said Robert Wallace, "they paying the sum of L.33 Scots as the entry of each heir, and that as the composition to be paid for the entry of *each* vassal." "Heirs and successors" did not, in any adequate or satisfactory manner, designate of necessity assignees. And the payment being one fixed sum, it would have been against any reasonable view of the contract of parties to infer that assignees were to be entered at the small sum fixed for heirs. This really was the view taken by the Court—for in the interlocutor of Lord Newton (Hay, an excellent feudalist), he put his judgment (adhered to *simpliciter*) most significantly on this ground—"Finds that the words founded on in the original feu-right are not sufficient to limit the superior's right, on the entry of singular successors, to a composition of L.53 Scots; and that it does not appear to have been in the contemplation of parties to limit the composition due on the entry of singular successors in any shape." It will be observed how completely the view thus taken of this case agrees with the view I have above expressed. The interlocutor is not rested on any general proposition, but on the import of that clause in regard to the actual contract in that case between the parties. So also in *M'Lachlan v. Tait*, 14th May 1823, the disposition clause in the feu-right bore, "doubling the feu-duty the first year of the entry of each heir and successor." There was an alteration in a subsequent clause, which ran, "the entry of each heir or *singular* successor. But the charter granted in implement (as it was stated) of this deed, which contained no warrant for any infeftment in any way, bore simply and absolutely—"duplicando dictam feodifirmam primo anno introitus cujuslibet hæredis vel successoris, &c., ut usus est feodifirmæ." It was held that the disposition could not be referred to. Hence the view to be taken of such a case was the same which regulated *Thomson*. But these cases, I hold, strengthen the view I have taken of the present.

LORD COWAN. At the time when the contracts in question were granted, there was no obligation by law on superiors to receive stranger-disponees by resignation on procuratory or by confirmation; and it was not till the Act of Geo. II. that their situation in this respect was altered. Indirectly, however, such parties could compel superiors to receive them on payment of a year's rent by leading apprising as creditors in terms of the Act 1469, c. 36; and more recently, when adjudication came to supersede apprising, it became common to adjudge the lands directly, for implement of the obligation to infeft, and thus to obtain an entry in the same manner as creditors. This is explained by Erskine, b. II., t. 7, s. 6; and b. II., t. 12, s. 52, and by Ross in his Lectures, v. 2, p. 269. Still, as set forth in the Act Geo. II., these methods of procuring entry by purchasers and singular successors were "*tedious and expensive*," in all cases where the superior was unwilling to accept resignation. That the superior did in fact consent in most cases to grant a charter is undoubted; and that the power which purchasers had of compelling an entry indirectly as now explained, led to consensual arrangements between superior and vassal, is equally certain, as explained by Stair, (b. II., t. 11, s.

July 16. 1853. 22.) The consent of the superior to the alienation of the lands by his vassal, which was then indispensable, might be "either *antecedent*, concomitant, or consequent to the alienation, and might be either express or tacit." Antecedent consent fell to be judged of in general from the terms of the feu-contract or charter; and such questions, when the feudal system was in its vigour, were all the more material, as, in the event of the vassal having alienated more than half of his feu, he suffered the loss of his whole lands under the casualty of recognition. It is undoubted that in interpreting clauses in the feudal grant alleged to have the effect of restricting the rights of superiors, the principle of strict construction is to be applied. The antecedent consent to the alienation must clearly appear from the terms of the title. But when it is found that the grammatical reading of its provisions permits of no inference as to the intention of the parties being fairly drawn, other than that the vassal, on the conditions specified, should have the power to alienate, then effect will be given to the contract of parties. The provisions of the feu-contract, or of the feu-charter following on it, form the *lex feudi*. The respective rights and obligations of superior and vassal must be regulated by those provisions. As matter of general observation, it may farther be noticed, before adverting more particularly to the terms of the charters for construction, that the word "*assignee*," which occurs in both grants, is the usual term in conveyancing designative of *singular successors* as distinguished from *heirs*. Craig states this in very strong terms, b. iii., d. iii., s. 3, where he says:—"Ex usu nostro *assignatus* seu *cessionarius* idem sit cum *singulari successore*." So far did he carry this view, that from the mere use of the terms "*heirs and assignees*," in the dispositive clause of the charter alone, without anything else in the deed indicative of intention, Craig held the superior debarred from objecting to alienation by his vassal to any extent, or in any circumstances. And the remarks of Lord Elchies, *voce* Superior v. Vassal, No. 13, in reporting the case of *Boyd*, are also very valuable in this respect, coincident as they are with the unhesitating statement of Craig. Nor does it detract from the force of the observation that the Court did not adopt, in the cases which subsequently arose, the views of Craig to their full extent. The cases of *Lady Carnegie*, 1663, D. 10,375; and of *Lockhart*, 1696, D. 6411, merely determined that the use of the words "*heirs and assignees*" in the dispositive clause of the charter, did not import the superior's consent to alienation of the feu *after* infeftment, but only before infeftment had followed on the precept. The word *assignees* was still held to mean *singular successors*; but the Court considered that a *limited class* of such successors alone, viz., those acquiring the right to the lands while yet personal, were within the consent presumed to be given to alienation by the superior's disposition to the vassal, "*his heirs and assignees*." The importance of these observations lies in this, that in the word "*assignees*," which occurs in both feus, we have a term comprehensive enough to embrace *singular successors* universally, provided in the particular deeds for construction it is used so as to demonstrate that in no restricted sense, but in its universal acceptance, it was meant to be declaratory of the understanding and agreement of the parties. Accordingly it will be seen, that in certain of the cases afterwards noticed, such general acceptance was held to be alone consistent with the terms of the contract between the superior and vassal.

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As I concur in the construction put by the Lord Ordinary upon the terms July 16. 1853. of the contract 1659, it may be as well to consider, in the *first* place, the provisions of that deed. The lands are disposed by it in feu-farm to the vassal, ^{Hamilton v. Dunn.} "his heirs and assignees *whatsomever*;" and the subsequent clauses refer to the vassal and his *foresaids*. Even that clause does so which contains the very specific obligation relative to the entry of heirs and assignees. That obligation was certainly intended to be a *condition* of the investiture, to be incorporated in all its parts into the titles to the feu during its subsistence. The first part of the obligation is to enter the *heirs* of the vassal "or his *foresaids*," i. e., of his "heirs and assignees," at *double* of the feu-duty to be paid by "*ilk* heir" in the first year of their entry, and the deeds to be granted for that purpose *appropriate to the entry of heirs* are specified. The second part relates to the entry of *assignees* of the vassal's, and his *foresaids*, i. e., of his heirs and assignees, at *quadruple* of the feu-duty to be paid by "*ilk* assignee" in the first year of their entry; and the deeds to be granted by the superior *appropriate to the entry of singular successors* are specifically mentioned. The clause as a whole embodies everything that was requisite to regulate as between superior and vassal the entry of heirs and singular successors throughout the continuance of the feu-right. To hold the latter part of it to apply merely to assignees or singular successors acquiring the subjects *before* infefment, and to become as inoperative the moment that the vassal was infeft, as if no such clause was in the contract, is inconsistent with the plain meaning of the words employed to express the obvious agreement of parties. It would, moreover, leave this contract altogether without example. The specific payment it provides for by each assignee of *double* the entry money to be paid by heirs, occurs in none of the previous cases. This peculiarity is to my mind conclusive, that the class of parties contemplated are singular successors universally, and not the *limited class*, or it may be, the *single person*—to whom, as assignee of the right when personal, the operation of the obligatory words must be confined, according to the contention of the pursuers. The expressions in the contract of 1643 are less full than those in the contract of later date; but substantially there occur in it the same decisive indications of intention to embrace within the operation of the obligation undertaken by the superior to enter vassals, all assignees or singular successors during the subsistence of the feu-right. The grant is in favour of the vassal, "his heirs and assignees *whatsomever*;" and the obligation as to the renewals of the investiture is, that the superior shall receive "the *airs* and *successors*" of the vassal "and his *foresaids*," (i. e., of his heirs and assignees), for payment of the sums specified—viz., "by *ilk* heir at his entry" five merks Scots money, or L.3 : 6 : 8 Scots, being a very limited proportion of the feu-duty, L.81 : 13 : 4 Scots; and "by *ilk* assignee to whom the said lands, &c. shall happen to be disposed in haill or in part, ten merks money." There are here, 1. The marked change in the phraseology in the introduction to the taxing clause from assignees to *successors*; 2. The obligation by the superior to receive such successors, whether heirs or assignees of the vassal and his *foresaids*; 3. The special stipulation that the clause should be applied to *ilk* heir and *ilk* assignee; 4. The composition to be paid by *ilk* assignee, fixed at *double* the entry-money of *ilk* heir; and, 5. The description given incidentally of the assignees intended to be em-

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braced by the clause in the distinctive words "to whom the lands should be disposed,"—making the declaration no other in substance and effect than if the words had been, not "ilk assignee," but "ilk donee." On these grounds, the two feu-contracts, and the charters which followed on them, appear to me, incapable, in sound construction, of any other meaning than that the entry of singular successors, as of heirs, was intended to be taxed in perpetuity, and that such was the contract of the parties to these feu-rights. None of the decided cases at all resemble the present, and no principle has been recognized at any time by the Court, inconsistent with the views which support the conclusion now stated. The cases of *Lady Carnegie* and of *Lockhart*, already noticed, regarded the casualty of recognition, and were decided in the superior's favour, on the ground that the mere occurrence of the word *assignees* in the dispositive clause could not be held to infer a general consent *in perpetuo* on his part to alienations by the vassal and his successors. It was thought a reasonable construction of the term to hold it satisfied by confining its operation to alienations of the right while yet personal. The construction thus put on the term in the dispositive clause has influenced the views of the Court in other cases where the same words, "heirs and assignees," or the equivalent term, "heirs and successors," *without any farther indication of intention in other expressions*, occurred in the clauses intended to regulate the entry of the vassal's successors. Such were the cases of *Salmon*, 1751, D. 4181; *Mag. of Inverness*, 1769, D. 15,059; *Sir Wm. Hamilton*, 1768, not reported; *Thomson*, 22d May 1810; and although the recent case of *M'Lachlan*, 14th May 1823, has some expressions which do not occur in the other cases, they are qualified by the important words (which occur also in the prior cases of *Salmon*, *Mag. of Inverness*, and of *Sir Wm. Hamilton*), *ut usus est feodifirmæ*. Those expressions were justly held in the particular case to cast the balance in favour of the superior. There are, on the other hand, various cases where the term *assignees* has received its more general acceptance from the stipulations and expressions in the deed by which it was accompanied. Of this class is the instructive case of *Nasmyth*, 1748, D. 5723, in which,—admitting that *singular successors* were included under the term *assignees*,—the question arose whether a party acquiring the superiority by a singular title was bound by the limitation thereby imposed on his common law rights. And to the same effect is *Ogilvy v. Kincaid*, 1780, not reported, but fully noticed in the papers referred to in subsequent cases, especially in that of *Mercer v. Grant*, 1790, also noticed in the pleadings, and in which the valuable opinions recited in the defender's pleadings were delivered. As so far supporting the same views, the case of *Stewart*, 3d June 1813, is also deserving of attention. This review of the cases shews satisfactorily, that in every question of this kind the terms of the particular feu-contract or charter are to be carefully weighed to get at the true intention and agreement of parties—regard been always had to the strict principle of construction to be applied in such cases. It is after giving full effect to that principle, that, on the grounds and for the reasons stated, I have arrived at the opinion that, according to the sound construction of the feu-rights of 1643 and 1669, the interlocutor of the Lord Ordinary ought to be adhered to as regards *Wester Kilbowie*, and altered as regards *Easter Kilbowie* and *Milton of Duntocher*.

LORDS COCKBURN, RUTHERFURD, and ANDERSON concurred with Lord Cowan. July 16. 1853.

LORD CURRIEHILL. In order to clear the way for the consideration of the defender's demand for an entry, as a singular successor, without paying a year's rent, in virtue of the clauses in the charters, it must be kept in view that he could make no such demand in virtue either of the common law,—or of statute. According to the common law of Scotland, the defender could not have compelled the superior to enter him on any terms whatever; because by the customary feudal usages of this country, feus were inalienable without the consent of superiors; and no vassal could compel his superior to accept of another in his place, otherways than in virtue of the statutes by which the common law, in this respect, was gradually modified,—first in favour of appraisers and adjudgers, and ultimately in favour of purchasers. This was the state of the law at the period when the charters in question were granted. Lord Stair, II. 3, 5, says, that fees are unalienable without the superior's consent; and that "there is no obligation upon the superior to receive any stranger or singular successor to be his vassal, except what the law hath introduced with us by statute or custom, in favour of creditors for obtaining satisfaction of their debts by appraising or adjudication." Sir George Mackenzie states the same doctrine in his Institute, II. 7, and also in his Observations on the statute James III., p. 5, c. 37. And Erskine, writing after the change of the law in 1748, as to its former state, says, II. 7, 5, "The superior was not bound to receive any person in the lands other than the heir, to whom he himself had limited the descent by the investiture, though the greatest sum should have been offered him in the name of entry." The consequences of this were often painfully apparent. For example, even when a voluntary disponee of lands, which were held of the Crown, had proceeded so far to complete his title, as to present his signature in Exchequer, his right might have been defeated by the subsequent institution of legal diligence by creditors under the statutes. This was held in the case of *Clelland*, 24th Feb. 1685, Mor. p. 15,032, "in respect the signature was on a voluntary right, and not on a course of legal diligence by appraising or adjudication; and that in voluntary rights it is arbitrary to his Majesty, as it is to other superiors, to receive or not receive a vassal." The principle was exemplified also very strikingly in ward tenures, by *recognitions*,—the alienation by a vassal without his superior's consent not only being ineffectual, but, when it exceeded one half of the subject, being visited with an absolute forfeiture of the whole. Moreover, at that period a vassal could not even alter the destination of his own heirs of investiture without his superior's consent. Hope, *voce* Tailzie, p. 147; Stair, II., 3, 43. Nor could the defender insist upon an entry without paying a year's rent, in virtue of any of the series of statutes above referred to, as it is a condition of all these statutes that a composition of that amount should be paid. Thus, (1.) The statute 1469, c. 37, requiring superiors to enter appraisers for debt, confers that privilege only on appraisers, "payand to the overlord a zeires mail as the land is set for the time." (2.) The statute 1669, c. 18, anent adjudications, enacts that superiors shall not be holden to grant any charter for infefting the adjudger, "till such time as he be paid and satisfied of the year's rent of the land and others adjudged, in the same man-
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July 16. 1853. *ner* as in comprising." (3.) The statute 1681, c. 17, authorising judicial sales by the Court of Session, only authorises a warrant "for charging the superior to enter the purchaser, upon payment of a year's rent." And (4.) The statute 20 Geo. II., c. 50, which for the first time imposed upon superiors the obligation of entering disponees by voluntary conveyance, qualified that obligation by requiring the vassal to tender the fees and casualties the superior *has a right to receive*,—the established meaning of which is, that the disponee must pay a year's rent. This statutory payment is not recognised as a proper feudal *casualty*, and is not, like the relief exigible from an heir of investiture on his entry, a *debitum fundi*. It is merely the compensation, or *composition* as it is usually called, which the Legislature has provided to superiors, for depriving them of their common-law immunity from having their entered vassals changed without their consent; and accordingly they may still exercise this immunity unless the singular successor, claiming an entry under the statutes, comply with the statutory condition of tendering a year's rent. The defender, therefore, has no right, at all events, either by the common law or by statute, to an entry without tendering such payment. But he claims a *conventional* freedom from the statutory obligation, because in each of the original contracts of feu there was an express condition that the superior should enter all the *assignees* of the vassals on payment of the specific sums mentioned in the *reddendos*. The pursuer, on the other hand, maintains that the phrase *assignees* did not include singular successors generally, but only parties, to whom vassals, without taking infeftment in their own favour, conveyed their personal rights. The question at issue, therefore, depends upon the true construction of the word "*assignees*" as used in these charters; and it must be determined by ascertaining the meaning of that expression, as used in such charters, at the period when those in question were granted. If it shall appear that the language, in which the parties to these documents expressed their meaning, had, at that period, a clear and definite or technical meaning, it must be held that that was the meaning to which they intended to give effect,—whether or not such language may have come to be used in a different sense, after the lapse of a century or two, and after the rules of law to which the expression formerly related, have meantime undergone great changes. Now the authorities of the period when these charters were granted, establish that those, who were then denominated "*assignees*" in such writings, were only parties to whom vassals, while their rights remained unfeudalised by infeftment, conveyed their personal rights.

To complete the relation of superior and vassal, it was necessary that the latter should be infeft. While the grantee was in the intermediate state of having received a personal grant of a feu, without having completed it by infeftment, the feudal disability to alienate was held not to operate against him, and he was permitted to convey that personal right to a third party. But in the juridical phraseology of Scotland, such a conveyance of a personal right even of land was denominated an *assignation*, and the grantee was denominated an *assignee*. Sir George Mackenzie says, III. 5,—"*Not only moveable but heritable rights whereon no infeftment has followed, and all incorporeal rights requiring no infeftment, such as reversions, patronages, servitudes, are transmissible by assignation.* But if sasine be once taken on an heritable right, it

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cannot thereafter be transmitted by assignation, but by disposition." And he adds, July 16. 1853.

—"He who grants the assignation is called the cedent, and he who receives it is called the assignee." Such was then the technical meaning of this phrase. ^{Hamilton v. Dunn.}

And indeed even till the present day a conveyance granted by a person uninfest continues to be called a *disposition and assignation*; while a conveyance by a vassal infest is called simply a disposition. In consequence of this power in the owners of such personal rights to substitute their assignees in their place, parties often regulated, by express stipulation, the terms on which the superiors should receive the latter as vassals. If this were not done, superiors might have been compelled to enter such assignees and their heirs without receiving any acknowledgment whatever,—because *as such parties were not in the predicament of being heirs of investiture, the casualty of relief was not exigible from them*,—and the statutory composition was exigible only from the singular successors of entered vassals. Nor were such stipulations useless and unmeaning; because, although such assignees could expedite infestment directly in their own favour on the superiors' open charters and precepts of sasine, when these existed, and were assigned to them, yet even they and their representatives had frequently occasion to take entries from the superiors. For example, 1. When, as was not an uncommon practice in former times, the charter by the superior, and his precept of sasine, were separate writs from the contract of feu, and were not delivered along with it, the vassal in such a case might have assigned his personal right under the contract before receiving the precept of sasine; and if he did so, the assignee must have applied to the superior to enter him by granting the requisite precept in his own favour. The case of *Ogilvie v. Kincaid*, 29th January 1673, immediately to be adverted to, was an example of this,—and also serves to shew that, without a stipulation to the contrary, an assignee of a personal right was entitled to an entry *gratis*. 2. It was also necessary for such an assignee to apply to the superior, or his heir, for an entry, when a precept, although validly granted by the superior, had not been executed until the death of either the granter or grantee; for by such an event an unexecuted precept of sasine fell; and this continued to be the case until the statute of 1693. 3. Even when assignees had expedite infestment in virtue of open precepts and assignations thereto, it was not unusual for them to obtain renewals of their investitures in their own favour, when entering into marriage-contracts, and on other occasions; and such entries were of course in the form of charters of resignation or confirmation. And, 4. At all events, even when such assignees were duly vested in the feus in virtue of the original grants, assignations thereto, and infestments thereon, and then died, their heirs required to apply to the superiors for entries; and in such cases the character in which they entered behoved to be that of *assignees*. It could not be that of *Heirs*, for of course that expression applied only to the *Heirs of investiture*; and neither the assignee, to whom the original granter of the feu conveyed his personal right, nor the heir of such assignee, was in the predicament of being an heir of investiture, and consequently it was in the character, not of heirs, but of assignees, entries behoved to be expedite in favour not only of the assignees themselves, but also of their legal representatives. Even in modern practice; when a vassal duly infest

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conveys the feu to a third party who dies unentered, the heir of the latter, when he enters, must enter, *not as an heir* paying relief duty only, but as a *singular successor* paying a composition. And in like manner the heir of even an *assignee*, to whom a personal right to a feu had been conveyed, but who had afterwards expedite infeftment on that personal right and on his assignation thereto, could be entered only as an assignee, on paying such a composition as by the charter may have been made exigible from assignees. Thus even proper *assignees*, or their heirs in their right, frequently required entries from superiors. This being the case, parties to feudal grants often arranged by express stipulations the terms on which such assignees should obtain entries. In many old charters, accordingly, there are stipulations that the *assignees* of the vassals should be entered on paying some specific sum. And according to the established technical meaning of that expression "*assignees*" as used in such charters in the middle of the seventeenth century, it included only those to whom the personal rights of vassals were conveyed. This is clearly brought out by the cases, in which it was found, that although vassals held their lands in virtue of charters containing express destinations to themselves and their heirs *and assignees*, yet even such vassals, after being infeft, not only had no power of alienation, but by granting alienations they incurred an entire forfeiture of their feus *by recognition*; Mor., p. 10,375, and 7733. Thus in the case of *Lady Carnegy*, 5th February 1663, reported both by Lord Stair and by Gilmour, a vassal was found to have incurred such a forfeiture by having granted a conveyance to even his own grandson; and although the forfeiture was objected to, *inter alia*, on the ground that the charter, by which he held the lands, having been granted to him and his "*heredibus et assignatis quibuscunque*," it imported the superior's consent to his alienation, yet the answer was sustained, "that this is adjected, to the end that those may be assigned before infeftment, but after infeftment assignation hath no effect, *and this is the true intent of assignees*." Again, in the case of *Lockhart*, 14th January 1696, Mor. p. 6411, which was a declarator of recognition in respect of a vassal having granted an alienation, one of the defences was, that the vassal's charter was granted in favour of him, "his heirs, *and assignees*;" but to that defence the answer was held good, that "a charter of ward lands *heredibus et assignatis*, is only a consent to their assigning before infeftment, *but not thereafter*." The term *assignees*, as used in such charters, had the same meaning in questions as to the entries with the superior. Lord Stair, in the passage already quoted, II. 3, 5, adds, that "the disposition, procuratory, or precept of sasine, *before infeftment*, are assignable; and the superior may be compelled to receive assignees, if the disposition be in favour of assignees. *But infeftment being once taken, he is not obliged to receive any assignee or singular successors*, otherwise than in obedience of horning upon apprising or adjudication, *getting a year's rent for accepting a new vassal*." And his Lordship repeats the same doctrine, II. 4, 32. And accordingly, even in cases where an assignee before infeftment was found to be entitled to an entry without paying a composition, it was stated as undoubted law that the case would have been different if the vassal granting the conveyance had been infeft. As an example of this, reference may be made to the reports by Stair and Gosford of the case of *Ogilvie v. Kincaid*, 29th

January 1673, Mor. p. 10,384. In that case there was a personal contract between Kinloch and Wadder, whereby the former engaged to convey certain lands to the latter, to be held feu of Kinloch by Wadder, with an obligation to infeft him, *his heirs and assignees*. Wadder, while his right remained on this personal contract, conveyed it to Ogilvie, who insisted on being entered by the superior, without even paying a composition. The superior resisted this demand on the ground that the vassal could not obtrude a stranger upon him; and although this plea was not sustained, yet the ground of that judgment, as set forth in Stair's report (and Gosford's report is to the same effect) is, "that albeit superiors be not obliged to receive the singular successors of their vassals by resignation or confirmation, *even though the vassal's right be expressly granted to heirs and assignees*; yet the inserting of heirs and assignees operates thus, that *before infeftment be taken by the first acquirer*, he may effectually assign his disposition or precept to any other, whom the disposer must receive." Gosford, in his report, says, "which is hard,"—a remark which, although perhaps not in unison with modern notions, serves to shew in a clear light how different in that age was the position of an *assignee* from that of a proper singular successor,—and also to shew the propriety of regulating by express stipulation the terms on which *assignees* might obtain entry, even in cases where superiors were not relinquishing their common-law right of declining to receive proper singular successors on any terms.

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Without further multiplying contemporaneous authorities, those now quoted suffice to shew the proper technical meaning of the term *assignees*, as used in feudal grants at the period under consideration. And that this was the case was familiarly known to Erskine, although he wrote after the year 1748. He says, II. 7, 5, that "even where the lands are made over in the superior's grant to the vassal *and his assignees*, the superior is obliged to receive the assignee only while the right continues personal, i. e., before sasine be taken upon it, *but not after perfecting it by infeftment*; for the word *assignee* in a feudal grant ought to be applied only to personal rights." Professor Bell states the doctrine in similar unqualified terms in his Principles, § 728. So familiar indeed was this doctrine in the practice of Scotland, that no trace appears in the Books of any attempt having been made prior to the date of the statute 20 Geo. II., by any voluntary disponee of an infeft vassal, to force an entry from the superior, without paying a year's rent as a composition, although the feudal investiture had been granted in favour of heirs and *assignees*, and the composition payable on the entry of *assignees* was taxed. All the cases in which this question has been agitated are of dates posterior to that statute. And perhaps it is not wonderful that after that statute had rendered effectual against superiors alienations made by their vassals, whether before or after infeftment, the limited meaning of the term "*assignees*," in the previous practice of the country, during the period when the charters in question were granted, should often have been lost sight of by persons not familiar with the history of the law. But although this question has from time to time been raised since the year 1748; yet, when it has related to charters granted at an earlier period, this always (with perhaps one exception) has been held to be the true construction of the term *assignees*. In the case of *Salmon*, 25th July 1751, Mor. p. 4181, a vassal was found not

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to be entitled to an entry without paying a year's rent, although by the superior's charter it was stipulated that the feu-duty should be doubled "the first year of the entry of *each heir or assignee*, as use is, of feu-farm." It no doubt appears from Elchies' report of that case (Superior and Vassal, No. 13), that he and others of the Judges proceeded upon the ground that singular successors in superiority were not bound by such clauses, *as being contrary to the nature of feudal rights*; and that the other Judges proceeded upon the ground that here "*assignee*," *could only mean assignee to the personal feu-contract*; and as he does not state on which of these views the majority proceeded, the decision is of little value as an authority, except as shewing how familiar to our Judges, even in 1751, was the common feudal-law principle that *sua natura* feus were inalienable. But the question was again raised in 1769, in the case of *Magistrates of Inverness*, Mor. 15,059, where a singular successor demanded an entry on payment of double the feu-duty, in respect that the feudal investiture had been granted in favour of the original vassals, and their heirs and assignees; the feu-duty being doubled *the first year of the entry of every heir or assignee to the lands*, as use is, in feu-farm. The demand was rejected, without apparently any difference of opinion; effect being given to the plea, that "though assignees are singular successors, yet all singular successors are not assignees. On the contrary, *assignation is properly applicable to personal, not to real rights*." In two cases, viz., *Thomson*, 22d May 1810, and *M'Lachlan*, 14th May 1823, the question occurred in reference to the construction of obligations by superiors to receive the heirs and successors of their vassals, on payment of duplicands of the feu-duties; and it was found that such clauses could not be construed as including singular successors. In the latter of these cases, it was farther stipulated in the disposition, on which the charter proceeded, that the superior should receive the vassals, "their nearest lawful heirs-male and assignees, as immediate vassals, in the said lands, &c., by precepts of clare constat, charters of confirmation and resignation, or such other forms as shall be for the time most agreeable to the laws and practice of this realm, and that gratis without any manner of composition," except a duplicand of the feu-duty. Notwithstanding this the judgment was as above stated. In a note to one of the editions of Erskine's Institute, (II. 7, 5,) there is an enumeration of various unreported cases upon this subject; but as there is no authentic account of the grounds upon which the Court proceeded in these cases, the decisions are perhaps not to be relied on as authorities. It appears, however, that all of these cases excepting one (*Ogilvy v. Kincaid*), were decided in favour of the superior; and therefore are at least in unison with the other clear authorities. The defender founds on a brief passage in Craig, stating an assignee to be a singular successor, III. 3, 31. But although that learned author held an assignee to be a singular successor, yet, (to adopt the language of the report of the case of *Magistrates of Inverness*,) he did not say that all singular successors were assignees; and accordingly, in the subsequent authorities above quoted, that brief expression of Craig was held to be inapplicable to the question under consideration. The defender maintains "that assignees in the personal right do not require entry, and are indeed incapable of being entered with the superior according to the ordinary feudal law;" and hence he infers that these *could not* have been the parties intended to be described by that expres-

sion. If that remark were well founded, it would stultify Stair, Erskine, July 16. 1853. Bell, and all the Judges who pronounced the series of decisions already referred to, for all of these authorities held that assignees of personal rights were parties who, (especially as the law stood at the period under consideration,) might require entries from their superiors. Several of the occasions, accordingly, in which, in practice, such entries were required, have formerly been alluded to. The defender also argues as if the stipulation in the charter of Wester Kilbowie, as to entries being by "charters of confirmation, resignation, or otherwise, as can be best devised," were applicable only to entries of proper singular successors. There was a similar stipulation in the case of *Thomson v. M'Lachlan*, and a similar argument founded on it was over-ruled. And rightly so, because even assignees, or their heirs in their place, often may, and, indeed, sometimes must, avail themselves of these modes of entry, as has already been stated. The defender farther argues, that because the compositions, stipulated in the charters in question, for the entries of assignees are somewhat greater than the relief stipulated for the entries of heirs, the former must have been understood to mean proper singular successors. That reasoning appears to me to be illogical. The stipulations shew clearly enough that the parties denominated "assignees" were different from the heirs of investiture, and consequently that it was natural and proper to settle the terms on which they were to obtain entries. But these stipulations do not warrant an inference that the term "assignees" was used in these charters otherways than according to what was then its usual technical meaning in the practice of conveyancers.

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Keeping these things in view, let it be supposed that the present question had occurred recently after the dates of these charters; that, for example, the original vassals, after being infeft, had disposed the properties to third parties with procuratories of resignation, and that the latter had demanded entries by charters of resignation, or that they had expedite adjudications in implement against the disponents, and demanded charters of adjudication from the superior,—on payment only of the compositions stipulated to be paid by *assignees*,—how would the question then have been decided? How would Stair, Gosford, and the Judges who decided the cases of *Carnegy*, and *Lockhart*, and *Ogilvy* have construed the word "assignees" in the charters in question? I cannot doubt that they would have given to that expression what, as we know, was held by them, and by all the lawyers of that age, to be its clear technical meaning. And, being satisfied of this, I cannot give the language a different meaning now,—whether or not, after the important revolutions which have since taken place in the feudal law of Scotland, such a phrase in a modern contract might be used in a different sense. Nor can I see solid ground for making a distinction among the different subjects. As to all of them, the question depends on the construction of the term *assignees* as used in the original charters; and I think that, according to the true meaning of these charters, the defender does not fall under that description.

On these grounds, I am of opinion that the interlocutor under review ought to be adhered to as to the entry to the lands of Easter Kilbowie, and Milton of Duntocher, and Poffie, called the Milncroft; and should be altered as to the entry in the half of the 32s. 6d. lands of the lands of Wester Kilbowie.

July 16. 1853. LORD WOOD stated that he was now of opinion with Lord Curriehill ; with whom—

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LORD MURRAY also concurred.

On advising the case along with these opinions,—

The LORD PRESIDENT stated that he adhered to his former views, which were similar to those of Lord Curriehill.

LORD FULLEERTON, however, had altered his opinion, and now agreed with the majority of the consulted Judges, with whom also—

LORD IVORY, adhering to his former views, and LORD ROBERTSON concurred.

The LORDS, "In conformity with the opinion of the majority of the whole Court, . . . Recall the interlocutor of the Lord Ordinary reclaimed against : Find that the entry of singular successors in the whole lands is taxed : . . . Sustain the defences, dismiss the action, and decern : Find the defender entitled to expenses," &c.

C. Douglas, W.S., Agent for Pursuer.

W., A. G., & R. Ellis, W.S., Agents for Defender. (J. M. M.)

MARTIN v. KELSO.*

No. 264.

Entail—Prohibition to alter succession—Construction—Faculty—Heirs-portioners—Succession.—The maker of an entail, which preferred the eldest heir-female and her heirs to the exclusion of heirs-portioners, made the following exception to the prohibition against altering the order of succession :—That it should be lawful to certain of the heirs in possession, "so often as their apparent or presumptive heirs are females, so far to alter the destination of succession above written as to settle the estate upon a younger daughter in preference to an elder ; and, for this end, to grant such deed as shall be competent of the law, in the same manner as an unlimited proprietor might do."—*Held*, 1. That, under this power, the estate might be settled upon a younger daughter, and the heirs whatsoever of her body, to the exclusion of an elder ; and, 2. That the power might be exercised by the heir at any time that his heirs-presumptive happened to be females, so as effectually to convey the estate, failing himself, to a younger heir-female, although, at the date when the succession to the estate opened by his death, his heir-apparent, under the entail, was not a female but a male.

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By deed of entail, dated in 1764, Mrs MacGill or Kelso, with consent of her sister, conveyed the estate of Dankeith, under the fetters of a strict entail, to herself in the first instance ; whom failing, to Captain John Kelso, and to the heirs whatsoever of his body ; whom failing, to certain *nominatim* substitutes, and to the heirs-male of their bodies respectively. It contained the usual declaration, that the eldest heir-female, in the event of the succession devolving upon females, should succeed without division, to the exclusion of heirs-portioners. It contained also a declaration, that it should be competent to the said Captain John Kelso, and to the descendants of his body, "so often as their apparent or presumptive heirs are females, so far to alter the destination of succession above written as to settle the estate upon a younger daughter in preference to an elder daughter, or to pass by such daughters altogether, and to settle the estate upon the presumptive heir-male descended of the body of the said Captain John Kelso ; and, for these ends, to grant such deed or deeds as shall be competent of the law, in the same manner as an un-

* See Report of former action of reduction, of date 28th June 1853.

limited proprietor might do." The title was completed by infestment in terms ^{July 19. 1853.} of this entail. Colonel William Kelso, a descendant of the body of Captain ^{Martin v.} John, after possessing the estate for some time, died in 1844 unmarried, his ^{Kelso.} heirs being his four sisters,—Mrs Martin, the pursuer's mother, and the person entitled as the eldest sister to succeed to the estate failing any alteration in the order of succession; Margaret Kelso; Mrs Utterson; and Eleanora Kelso. But Colonel Kelso had, by a settlement dated 4th April 1837, proceeding on the powers of alteration contained in the entail, called to the succession his youngest sister Eleanora, and conveyed the lands of Dankeith, failing heirs of his own body, to her and the heirs whatsoever of her body. She accordingly entered into possession at his death, and obtained in absence a decree of declarator, whereby it was found that heirs of Colonel Kelso's body had failed, and that Miss Eleanora Kelso had right to the estate. She obtained infestment, and on 14th April 1849 granted a disposition as heir of entail in possession, whereby, upon a recital of the powers conferred by the entail to alter the order of succession, she disposed the lands of Dankeith in favour of herself and the heirs whatsoever of her body; whom failing, to her sister, Mrs Utterson, and the heirs whatsoever of her body. At the date of this disposition her presumptive heirs were Mrs Martin, the pursuer's mother, Mrs Utterson, and Margaret Kelso. But shortly afterwards the state of matters was changed by the death of Mrs Martin early in 1850, whose eldest son thus became, under the entail, the nearest heir presumptive to the estate of Dankeith. Miss Eleanora Kelso then obtained decree authorizing a disentail of the estate, having obtained the consents of Mrs Utterson and two of her sons.

The present action of reduction was now raised by William Kelso Martin, Mrs Martin's eldest son, of (1,) Colonel Kelso's settlement of 1837; (2,) the decree of declarator in favour of Miss Eleanora Kelso, and her sasine; (3,) Miss Kelso's disposition of 1849, and the sasine thereon; and (4,) the decree of disentail. The pursuer pleaded that the three first writs was reducible, as at variance with the destination in the entail, in so far as regarded the destination in favour of the heirs whatsoever of the body of Eleanora Kelso; that Miss Eleanora's disposition of 1849 was reducible on a similar ground, in so far as it called, failing Mrs Utterson, her heirs whatsoever; but further, that this disposition, and all that had followed thereon, were wholly inept, as being in contravention of the prohibition against altering the order of succession, and as not falling within the scope of the exception to that prohibition. In defence, Miss Eleanora Kelso maintained the validity of all the deeds sought to be reduced.

The Lord Ordinary (Anderson) repelled the reason of reduction, in so far as regarded Colonel Kelso's settlement, and decree of declarator, and sasine following thereon: But in so far as regarded Miss Kelso's disposition of 1849, sasine thereon, and the decree of disentail "being the writings called for under the third and fourth heads of the summons, Repels the defences, reduces, &c., in terms of the conclusions of the summons."

Both parties reclaimed.

Mure, and Neaves, for Miss Kelso.

N. C. Campbell, and H. Robertson, for Mr Martin. 1. The power of alter-

July 19. 1853. ing the order of succession could only be exercised in favour of a younger heir-female *personally*, and could not include the heirs of her body. (2.) In determining the true nature of the power intended to be conferred under the clause of exception to the prohibition to alter the succession, regard must be had to the condition of the heirs apparent, not at the date of the deed of alteration, but at the date when the succession opened; so, as Mrs Martin is now dead, while Miss Eleanora, the granter, is still alive, and as the pursuer is nearest and lawful heir-apparent or presumptive under the taillied investiture, his rights as substitute heir of entail cannot be affected by Miss Eleanora's deed of alteration.

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LORD JUSTICE-CLERK. Taking the principles which guided the decision of the former action of reduction in which Miss Kelso's own title was challenged, I am not able to concur in the views expressed by the Lord Ordinary. I cannot adopt a view, which was thrown out in the argument, viz., that if among one family of heirs-female the preference is once exercised, it cannot under the entail itself be again exercised among the same family of heirs-female, by the heir-female who has been by deed of preference selected out of her turn. As Miss Eleanora is a descendant of the body of Captain John, as much as Colonel Kelso was, and as her presumptive heirs were females when her deed was executed, I apprehend she is as much entitled, under the terms of the deed of entail, to exercise the power of selection in her turn as any one else. But then the pursuer says the power of alteration is only given to the extent of preferring one female to another among the sisters, but not to call in the heirs of that female in preference to the heirs of the older sisters; and hence that on her death of necessity the succession under the deed of entail must go back to the heirs of the eldest sister, since, though she might be passed over, her heirs could not. This view of the clause is, I think, unsound. For the power is given so far to *alter the destination of succession as to settle the estate upon a younger daughter in preference to an elder*. Now the proper and natural, as well as the technical meaning of the expression—*power to settle the estate on a younger daughter*—is to place the right of succession in her so as to go to her heirs, just as if she had taken it by the order appointed by the entailer. By the exercise of the power of alteration to the full extent to which it is given she becomes the *first* sister to take, though not the eldest by birth among the family of females, and she thus takes the place of the eldest heir-portioner, and so she and her heirs thus become the first branch of the substitution. If one may look, as the Court thought it was competent to do in the construction and operation of such a power as this, to the objects which the entailer had in view in bestowing it, it must strike one very forcibly that, when the presumptive heirs are a family of sisters, the reasons for preferring a younger to older sisters may often arise out of the marriage of some of the females, and the character and conduct of her children. A party may doubtless think one sister likely to be a better representative of a family than the others, and more likely prudently and usefully to manage a landed property. But in general the most important grounds for such selection will arise out of the marriages made by some of the ladies and the character of their issue,

whom the heir in possession may not wish to succeed him. Hence, if we look ^{July 19. 1853.} to the objects in view in bestowing such a power, I have no doubt that the succession of the issue of the female preferred is as much within the entailor's ^{Martin v. Kelso.} presumed intention as the preference of the female herself. But apart from that view of the matter, the very terms employed, by bestowing a power to alter the *destination* of the succession *SO FAR AS to settle the estate* on a younger daughter, denote the settlement to the full extent and effect of making her a prior heir in the substitution, just as much as if she were in fact the eldest; and so of course to bring in her heirs.

But then the pursuer further pleads:—Granting that Miss Eleanora had the power in question, and that she might, if her presumptive heirs were females, execute a deed by which Mrs Utterson and her issue shall be called before Mrs Martin and her issue; yet that deed cannot be allowed to take effect in her own lifetime, irrespective of the state and condition of her heirs at her death; and that if *at the time of her death* the state of the succession shall no longer be such as it was when she executed her deed,—if the heir to succeed her then under the entail is not a female, but a male,—then the case has not occurred in which her deed can be effectual; for the entail takes the case of the apparent and presumptive heirs being females, and though that might be the state of things at one time, and she might competently execute a deed of selection in anticipation of that course of succession; yet, if afterwards and at her death a male is the heir, the deed is no longer applicable, and cannot then take effect; and if that would be the result if she did not act on her deed in her lifetime, and pass infetment on it, then she cannot increase her own power and give greater effect to her deed, by taking any actual state of things as to heirs-female when all are perhaps young or unmarried, and assume that her heirs will be females, and so infest one sister in preference to another, when the very case which alone gives her the power may fail long before her death, and when her presumptive heirs then may be wholly males, and all her sisters may have long predeceased her. It is enough, it is contended, to give the power for the actual case if it shall occur. True the deed must be executed in her lifetime, and before there can be any actual certainty of her heirs continuing to be females. But then as a party's heirs are those to whom the succession would open at her death,—as the event to be provided for is succession to herself after her death,—if she has no heirs-female at her death, the case has not occurred which alone could give an opening for, and validity to, her deed of preference. Hence the pursuer contends that the deed of the heir in possession in such a case must remain until her death to take effect, if her heirs are females, and can only come into operation in that event. That is a very fair view of the matter; and it has made a great impression on my mind, and if the Court had in the former action of reduction adopted the principle of a strict construction of the power bestowed—if they had held that the power was only given to a father to select among daughters, and this question had occurred as to a father's deed when at his death his heir under the entail was not a daughter, but a male, I should have been ready to hold that the deed of preference could only take effect if there was one daughter at the time of his death. My own view of the principle of construing such a power of alteration bestowed in

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an entail by way of exception from the general prohibitions is, that as the heirs are put under general and unlimited prohibitions in the first instance, the power to alter should be very strictly construed, and restricted within the very letter of the terms employed in the principal and operative part of the clause of exception. But that principle your Lordships did not adopt, for Colonel Kelso's deed was sustained, although he did not prefer one *daughter* to another, but one *sister* to another,—and that on general views rested on other parts of the clause, the soundness of which I do not now dispute as to the *objects* of the testator. But if such views as to the objects of the testator were admissible in the disposal of the point as to the *extent of the power* bestowed by the clause of exception, *multo magis* must the like considerations be legitimately brought to bear as to the subordinate question, as to the *mode and time* of exercising the powers bestowed, on which the objects of the testator according to all reasonable presumptions may very powerfully be brought to bear. I apprehend that the proceedings carried on under the power to disentail given by a recent Act of Parliament, cannot legitimately be used as in any way bearing on the question under the entail as to the validity of Miss Kelso's deed. We must consider the case as if the question had occurred when she passed infestment on her deed of alteration, and so *settled* the estate on one of her sisters in preference to her elder one. If that deed as a formal deed of settlement have been effectual, under the terms of the entail from its date, and if the interests thereby appointed could be secured by infestment upon it in Miss Eleanora's lifetime; whatever might be the eventual state of the course of succession at her death by any intermediate changes, then it is clear that the operation of the recent Entail Act cannot bear on the question at all. The deed might have been executed and infestment passed on it before the recent Entail Act. If the deed and infestment would have been valid and unchallengeable before the statute was passed, so as to make a valid settlement of the estate on one sister in preference to another, then certainly the fact that the statute in question has passed cannot affect the decision of the legal point raised as to the competency of the deed executed by Miss Eleanora Kelso. If what she has done was valid under the entail, it cannot surely become invalid, because, since the date of the entail, an Act of Parliament has passed which gave powers or faculties to heirs of entail which they did not previously possess. The pure question therefore comes to be this :—Whether Miss Kelso's deed and infestment are valid and effectual under the entail, so as to secure the settlement of the estate according to the destination therein contained. I will first state my views of the operation of the clause in the entail. I proceed on the principle that this clause is to be liberally construed as to the *extent* of the power of alteration conferred. Then how is it to be exercised? 1. It is admitted that it may be exercised by the heir in possession according to the state of the course of succession which she sees before her. She cannot be compelled to sign her deed in the act of expiring; 2. Well then, she may *execute* such deed when her heirs-presumptive are females. 3. The clause does not say merely that she may, by a deed of nomination, appoint one heir-female to succeed to her rather than another. That is not an uncommon expression when a power of alteration is given, and may be so worded as to render only a *mortis causa* deed competent. But the

terms are very large and comprehensive. So often as the heirs-presumptive are females it shall be lawful for the heir in possession to alter the *destination* of succession. That is a very strong expression. Is this deed not granted in a case which falls under the terms, "so often as the heirs-presumptive are females?" That cannot be disputed. Then does it not alter the destination of succession? That cannot be disputed. Why is it not to be effectual? 4. The terms are, that in the state of things which the entail supposes may exist, the alteration may be made. Then, where are the terms which import that the effect of such a deed shall be suspended until the granter's death; and which render the deed granted in the very state of things which makes it competent under the entail, inoperative unless the granter, which she cannot know, is actually to be survived by heirs-female. The power is given in express terms, so often as the state of facts occur. The operation of the power, if exercised, is not suspended by the clause until the granter's death. (5.) Then what is the meaning of a power to *alter the destination of succession*. These terms import a present change which shall regulate future succession. They point to some final and complete change which it is declared the heir may competently grant, whenever the presumptive heirs are females. Then once made, is it not implied, or rather does it not necessarily follow, that what was done in the very state of facts supposed, shall stand good and effectual as the future destination of the succession? (6.) But, further, the power is so far to alter the destination as to *settle* the estate on a younger daughter in preference to an elder. I think this term necessarily implies that the deed is to be effectual at once as a *settlement* of the estate on the party preferred. The term presumes a power to *settle* the matter in the state of facts which has occurred; and if there is a power to *settle*, (which is not a contingent or conditional act, but a present act in itself final), then that cannot be dependent on the state of things at the death of the granter. (7.) But this view of the import and effect of the term "*settle the estate*," is immeasurably strengthened when the rest of the clause is attended to, viz., That the estate may be so settled on a younger daughter *in the way an unlimited proprietor might do*. There is no doubt that an unlimited proprietor might do what Miss Eleanora Kelso has done. But an unlimited proprietor's deeds would not be suspended until his death. His settlement of the estate on one sister in preference to another would take effect, if he so chose, from the date of the deed, and would not be dependent on heirs-female surviving him. Now, beyond the power of controversy, if an unlimited proprietor, whenever his heirs-presumptive are females, is to execute a deed *settling* the estate, (a term which excludes conditional efficacy), on a younger sister in preference to an elder, such deed is effectual at once if the granter chooses, and is not dependent on any after-state of facts. Then how shall so fundamental a restriction, as that the deed is to be contingent on the state of things at the granter's death, be stated consistently with this clause against the deed of Miss Eleanora Kelso, which could not be stated against the deed of an unlimited proprietor? The clause has not even indirect words of qualification leading to such a restriction. Hence the mode and way of exercising the power must be such as an unlimited proprietor might avail himself of. Hence, by the very terms of the clause, there is an end of the question.

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It has been further urged that the deed *is allowed to be executed in some contingent event*, and so that its legal effect is to be determined at the time when it is to receive effect. But this argument was, in the first part of it, an assumption which the clause does not support, and the conclusion from it is in truth the whole question at issue between the parties. The deed is not allowed to be executed only on some contingent event. It is, on the contrary, *allowed to be executed* on the actual occurrence of the state of facts mentioned in the clause. The deed is then competently granted in precise and exact fulfilment of the power given, and in the very predicament in which it is allowed to be executed. I am in no degree moved by the case put, that the granter being unmarried at the date of such a deed, and having selected one sister in preference to another, might then marry and have issue; and the question put as to that case,—would the deed take effect if she had not disposed to her issue? First, if the granter had a son, then there is no power to exclude him, and he would take, in preference to all the other heirs, by force of his place in the substitution as a prior heir. Even if the granter had omitted his own heirs-female, the ordinary condition *si sine liberis* is applicable to such a deed and would evacuate it. On the whole, I am of opinion that the interlocutor must be altered.

LORD COCKBURN. On the question, whether Colonel William or Miss Eleanora Kelso had power to prefer, not merely a younger heir-female, but the heirs of that heir-female's body, I agree with the Lord Ordinary. The construction contended for by the pursuer, which limits the power to the younger heir-female to the exclusion of her heirs, seems to me to be irreconcilable both to the words and to the declared object of the deed. When the heirs-presumptive are females, the entailor allows the person in possession "to alter the *destination of succession*," not the mere individual succession of the heiress preferred, but the whole *course of the destination*; and the possessor is to do this by *settling* the estate, and this as freely as it could be done by an *unlimited proprietor*. I cannot exhaust these words, or attain the avowed object by merely allowing the preference to be given to the single selected heir-female. The deed declares, in another clause, that when the succession devolves on the eldest heir-female, it shall *descend to the heirs of her body*. Descent to the heirs is a part of the line of destination. Now when the heir in possession is allowed to exclude the eldest heir-female, and to prefer a younger one, this quality of descent to her heirs attaches to the nominee. No other construction will *settle* the estate—as an unlimited proprietor might—in a new destination. The opposite construction would *disturb* the succession by exposing it to the chance of reverting, after the expiration of individual lives, to new lines or to revivals of old lines. On the question, whether the exercise of the power can receive effect *prior to the death of the person exercising it*, I differ from the Lord Ordinary, who has decided that it cannot. On this point nothing is necessary but to read the clause, the clearness of which, so as to avoid our own speculations, seems to me to supersede all doubt. It confers a power on the heir in possession to alter the destination *in a particular existing event*, and as often as this event shall occur. The power may be exercised "*as often as the apparent or presumptive heirs are females*." Not *once* throughout the endurance of the entail, but *as often*, and not in reference to any

future or contingent state of matters, but as often as the presumptive heirs *are* July 19. 1853.
 (that is, are *at the moment*,) females, and this as freely as might be done by
 an *unlimited proprietor*. Notwithstanding these very plain words, it is ^{Martin v. Kelso.} argued that though the heir in possession may perform the ceremony of *executing a deed* whenever the presumptive heirs *are* females, the power cannot be exercised *effectually*,—which means that it cannot be exercised at all; that is, that its exercise cannot *receive effect*,—until he be dead. The ground of this view is, that it is not the circumstances *existing at the time of exercising the power* that are to be considered, but the remote and uncertain circumstances that may exist at the period of the *exerciser's death*; so that if the presumptive heirs *tempore mortis* happen not to be females, their having been so when the power was exercised becomes of no consequence. Now I can neither reconcile this to the words nor to the object of the deed. The object was to get the destination *settled*, and settled by the *existing heir*, as an *unlimited proprietor*. I do not see how this can be done if the existing heir is obliged to live on uncertain what the result is to be, crippled in all his views and plans, and his destination liable to be broken up at any moment of his whole future life, by the accident of a postponed eldest sister having a son, and thereby making the presumptive heir cease *at his death* to be a female. Nor is this reconcilable with the words of the deed. Accordingly, it is not either on the words or on the object of the deed that the pursuer rests, but in stating certain *results* of the defender's construction, which he thinks odd, or incredible that they could have been within the entailor's contemplation. The whole of these supposed results resolve into this—that it would be strange to suppose that the entailor meant the power to be exercised, when, *accidentally*, the presumptive heirs were females, though this state of matters might cease during the life of the person exercising it. So far was this carried, that the immediately preceding clause, which empowers the heir in possession to exclude an *attainted traitor*, has been said not to continue effectual if the attainder should be afterwards reversed. So far from seeing anything strange in these results, it appears to me that, *with the entailor's object*, they are exactly what, had he foreseen them, he would have desired. I can discover no ground for believing that he meant the traitors, whom he ejects on account of their *incurring* attainder, to get back the estate by having the good luck to get their attainder reversed. He plainly meant the destination to be *settled at once*, and not to be subject to subsequent accidents throughout the whole life of the person availing himself of the power. It was observed that there was at least one event, *viz.*, the exerciser of the power having afterwards a son, who, it was said, would *certainly* not be excluded; and that one case of the kind being clear, there might be others. Even if this were true, it would not follow that one exception affected *every* exercise of the power. But I do not admit it to be true: In cases depending *on common law*, the principle *si sine liberis decesserit*, is held to be an implied condition. But there is nothing to prevent the application of this principle from being *excluded by a deed*. There is surely nothing illegal or incompetent in an entailor allowing an heir in possession to exclude his own children from the succession, and making the possible exercise of this power a condition of the entail. I think this has been done here. The possessor is, as I think, allowed, at any moment at which

July 19. 1853. *Martin v. Kelso.* the presumptive heirs are females, to select one of these females, and to settle the destination on her, to the exclusion of the heirs of the bodies of the other females, including the heirs of the body of the very person exercising the power. It may seem odd in Colonel Kelso, or in Miss Eleanora, to oust their own hypothetical sons, but they, as other heirs may, probably thought the hypothesis rather violent, and at any rate, they were entitled to exclude them by this deed.

LORD MURRAY was absent; but it was stated by the Lord Justice-Clerk that he concurred with the majority of the Court.

LORD WOOD, while he expressed his concurrence with the other Judges in regard to the other points, differed from them as to the separate ground of reduction applicable to Miss Eleanora Kelso's deed, and the sasine thereon, holding, with the Lord Ordinary, that they were reducible as contravening the entail. He observed:—In terms of the destination of the entail, having regard to the clause excluding heirs-portioners, which declares that the succession shall devolve upon the eldest heir-female without division, the pursuer is the party *expressly* called to the succession by the entailer after Miss Kelso and the heirs of her body. Thus apart from Miss Kelso's deed of alteration, the pursuer's position in the destination is beyond dispute, and he can only be deprived of it, if the right to do so can be clearly shewn to be given by the power conferred on Miss Kelso as one of the descendants of the body of Captain John Kelso. Now, while it must be admitted that her heirs-apparent or presumptive were females when Miss Kelso executed the deed of alteration in April 1849,—what is pleaded is, that is this not sufficient to fix absolutely its validity as respects its operative effect, which, it was argued, depended, according to the sound construction of the power, upon the condition of the heirs *not* at the date of the deed, but at the date when the succession opens under it; and then it was maintained, that as Mrs Martin is now dead, while Miss Eleanora Kelso the granter is still alive, and as the pursuer is now the nearest and lawful heir-apparent or presumptive under the tailled investiture, his rights as substitute heir of entail cannot be affected by that deed of alteration. Whether reference shall be had to the condition and character of the heirs at the date of the deed of alteration, or at the date of the succession opening, in determining whether the deed shall have effect in changing the order of succession, appears to me to depend upon the intention of the entailer, as it can be collected from the words of the empowering clause, construing them fairly and reasonably, and with such light as may be derived from the rest of the tailzie. Whatever may be the form of the deed in which the power might competently be exercised, whether by a *mortis causa* deed only, subject to recal by the granter, or by a deed over which he or she should have no control, I think that the structure of the clause and its object mark that the force of the deed to be executed in virtue of it in producing an actual alteration in the appointed line of succession, was contingent upon the state of the heirs when the succession came to be open by the death of the granter. The power conferred was not to affect the granter's own rights or position in the entail. It is only at his or her death that the deed is to take effect, and I cannot think that, if the heir to succeed in terms of the entail was *then* a male, it can be held upon a sound construction of the power,—which is a

power to alter the destination of succession so as to settle the estate upon a younger daughter, and so on,—that by the exercise of the power, (it might be many years before), when the heirs-apparent or presumptive happened to be females, the right of that party could be disappointed. This would be to alter the succession when the heir who had the right by the entail to succeed was a male, by a deed executed changing the line of succession among heirs-apparent or presumptive, then females, but who in the event never had any right to succeed. But as I read the power, it is not one to enable that to be done, but to enable the succession to be altered, which would *de facto* take place under the destination in the entail, when the heirs are then females, by preferring one daughter to another daughter, so that a younger daughter should succeed instead of an elder, or by passing by the said daughters altogether in the manner provided. It is said that the empowering clause does not in words bear reference to the condition of the heirs at the date when the succession opens, and to their being then females, as the thing on which the operation of any deed executed in exercise of the power was to depend. That may be true. But according to what I apprehend to be the correct reading of the clause, it will I think be found that the efficacy of a deed of alteration to actually operate an alteration of the order of succession cannot in all cases depend on the state of matters at its date, and that there are cases in which, on the contrary, their state when the succession opens must be looked to, and will regulate whether it is to operate or not. Take for instance the case of an heir executing a deed of alteration, when his heirs-apparent or presumptive, *not* of his own body, are females, and that he afterwards marries, and has a son by whom he is survived, it is clear that the son would succeed. But this shews that the fact of the heirs being in the condition referred to at the date of the deed, is not the test of its operative validity. Accordingly this would be the result in the case now before the Court, were Miss Kelso to marry and leave a son who survived her. The deed of alteration in favour of Mrs Utterson would undoubtedly have no effect. And it may be that the same thing would follow if she had a daughter, although the deed she had executed was placed beyond her power of voluntary recall. I am not now inquiring into the principle upon which it may be contended, that the son or daughter would take the estate notwithstanding the deed of alteration. I refer to such cases as proving that the deed of alteration is not to be determined by the condition of the heir at its date; and that on the contrary their condition when the succession opens must be looked to. But farther, suppose the deed of alteration to be executed by an heir, who at the time has two or three daughters, and when therefore his or her heirs-presumptive are females, but that a son is afterwards born, who is alive at the death of the maker of the deed of alteration; I hold that such being the state of things at the date when the succession opened, the deed could have no effect, although at the date of its execution the presumptive heirs were females; and this notwithstanding that the clause provides “that it shall be lawful to Captain John Kelso, and the other descendants of his body, so often as their apparent or presumptive heirs are females, so far to alter the destination of succession,” and so on; and on which provision the defenders found, as shewing that the validity of the deed, as of force to make a change in the order of succession *absolutely* depends on the

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July 19. 1858. condition of the heirs being *at its date* such as is above designated. But if in *that* case the terms of the provision would not be of force sufficient to make the condition of the heirs at its date of overruling weight in the question of its efficacy to the exclusion of their condition when the succession opened being a necessary element in its decision, I do not see how the terms of the clause can admit of a reading by which it can be held that in a case like the present the efficacy of the deed must be determined by the condition of the heir at its date, and that if only the heirs-apparent or presumptive were **THEN** females, it shall operate as an alteration of the order of succession, whatever changes had subsequently taken place, and although, when the succession opened, the heir-apparent was not a female, but a male. If in the one case the operative effect of the deed is to be regulated by the condition of the heir at the *latter* period, it does not appear to me that it can be consistently found that it is not to do so in others. There is no room for concluding that there was to be a different rule in different cases. One rule for all could alone be contemplated; and if in one case the term of the succession opening must be looked to, this, as it appears to me, ought to have the greatest, or rather decisive weight in the solution of the question, whether it is not also to be looked to in others. But on the other hand, if the plea of the defenders is pushed the length that in all cases without exception, the validity of the deed to give effect to the alteration of the succession it contains depends wholly on whether at its date the heirs-apparent or presumptive were females, and that the extent and import was such that in that case it must have effect when the succession opens, be the condition of the heirs *then* what it may, this would lead to a result, which to my mind would be conclusive that the condition of the heirs at the date of the succession opening was all in all to its efficacy, for otherwise then in all the cases which have been put the male heir afterwards born and surviving would be excluded. There is another exception in the entail from the prohibition against altering the order of succession, in the case of apparent heirs being incapable of succeeding in respect of forfeiture for treason. In that case it appears to me to be clear, that the deed executed during the subsistence of the attainder would be inoperative, if, when it came to be acted on by the death of the granter, the incapacity of the heir passed by had been removed. No doubt there is some difference in the wording of that provision and the one on which the present discussion has arisen; but I think that when its terms are attended to, and also those in which they are *both* mentioned in the clause immediately following the provision in question, they will be found to shew, that according to the sound reading of the latter, no deed of alteration in virtue of it can have any effect, if when the succession opens the heirs are not females. In the provision relating to heirs incapacitated, the power is, "so far to alter the destination or order of succession above written as to *exclude* such incapacitated person from the right of succeeding to the aforesaid lands," &c. Then, in the clause providing for the exercise of *that* power of alteration, and also of the one in question, in case "the heir in right of the estate for the time shall be clothed with a husband," it is declared, "that notwithstanding thereof, it shall be competent to her to make the aforesaid alteration of the course of succession, *excluding* the person or persons incapable, or heir-female

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aforesaid, by herself without her husband's consent." Thus, both the powers of altering the destination of succession are here described as powers, the effect of which, when exercised, is to be that of *excluding* the person or persons, or heirs-female, thereby displaced from their position in the entail. They are alterations of the order of succession, excluding the person incapable, or heirs-female aforesaid. But if it be free from doubt, as I think it is, that by one power the person or persons incapable who can be excluded are only those who may be incapable at the date of the succession opening—that it is to the condition of the heir at that date, and not at the date of the deed, that the operative effect of the deed must depend—it appears to me, the same rule must have application in the other, both powers being shewn, by the words used in reference to both, to be powers which, in the contemplation of the entail, were to have the same operative effect upon the course of succession appointed by the entail; and that the one was not to be of force to produce an alteration excluding an heir entitled to succeed, in circumstances in which the other would not do so. I have not overlooked the fact, that in giving the power, in virtue of which Miss Kelso's deed was executed, it is added, that "for these ends" the party exercising it may "grant such deed or deeds as shall be competent of the law, in the same manner as an unlimited proprietor might do," or the observations which were founded on it. But I cannot say that either have made any great impression on my mind. I do not think that such a provision is of any material consideration as aiding the ascertainment of the extent or nature of the power conferred. Being introduced by the words "for these ends," it, I apprehend, amounts only to this, that whatever may be the power (which must be altogether independently fixed), then, in order to the carrying into effect the exercise of that power so defined, the heirs shall be as unfettered in relation to the deeds to be granted as if they were unlimited proprietors. I am therefore, upon the whole, of opinion with the Lord Ordinary, that Miss Kelso's deed of alteration, and the sasine following thereon, which *affects the lands*, and the decret of 7th March 1850, ought to be reduced.

The COURT "Refuse the reclaiming note for W. Kelso Martin, and to that extent adhere to the interlocutor of the Lord Ordinary, so far as complained of by that reclaiming note, and of new repel the reasons of reduction of the deeds called for under the first and second heads of the summons; sustain the defences so far as applicable to these deeds, and assoilzie; but in so far as the interlocutor is complained of by the reclaiming note of Miss Eleanora Kelso, alter the same; repel the reasons of reduction, so far as directed against the deeds called for under the third and fourth heads of the summons; sustain the defences, assoilzie, and decern; and therefore assoilzie from the whole conclusions of the summons, and decern: Find no expenses due to either party."

Hunter, Blair, & Cowan, W.S., Agents for Miss Kelso.

John Martin, W.S., Agent for Mr Martin.

(J. M. M.)

M'KIE OR MACKAY v. BAILLIE.

No. 265.

Poor-law—Relief—Mother and Child.—A woman having applied for parochial relief for her child, the inspector offered admission to herself and child to the workhouse. This offer she refused for herself, but was willing to accept for her child:—*Held*, that although the

parish had failed to prove that the woman was able to support herself and child, the tender made by the inspector was a sufficient tender of practical relief.

1st Division.

July 20. 1858. Patrick M'Kie or Mackay, a boy of eight years of age, presented a petition with the concurrence of his mother, to the Sheriff of Lanarkshire, praying for an order on the inspector of poor for the parish of Old Monkland for parochial relief.

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Answers were lodged for the inspector, stating that the mother was able to support her son, but that in order to test whether she was the necessitous individual she represented herself to be, he had given her an order of admission both for herself and child into the workhouse—that she was willing to accept it for her child, but refused it for herself—that the instructions of the board of supervision are to keep parents and children together—and therefore the present claim should be dismissed.

The Sheriff found for the petitioners, and ordained the defender to receive the infant petitioner into the workhouse without his mother.

The defender advocated, and the Lord Ordinary, (Anderson), after proof as to the facts, "Finds, 1st. That Mary M'Kie or Mackay the mother of Patrick M'Kie or Mackay was at the date of application for parochial relief, an able-bodied woman, and able to support both herself and her son. 2d. That on an application being made to the parochial board of the parish of Old Monkland for relief to the said Patrick M'Kie or Mackay, an offer was made by the parochial board to receive into the poor-house both the mother and the son, and that this offer was refused: Finds in law that no claim for parochial relief can be maintained either at the instance of the said Patrick M'Kie or Mackay in his own right or of his mother on his behalf." Therefore assails the defender, "but having reference to the position of the parties, finds no expenses due." In a note his Lordship stated, that "the question must be determined with reference to the ability of Mary M'Kie to work, and not merely to her mode of occupation or employment. . . . The only ailment from which she suffered was a swelling in her neck; and although two of the medical men are of opinion that it might interfere with severe toil or extraordinary exertion, they do not think that it would be affected by ordinary work, or prevent her from earning a livelihood for herself and her son in many of the lighter occupations in which females are employed. . . . Now, what she desires to do is, either to have the child sent to the poor-house, whereby she will be enabled to spend a larger amount of her earnings on herself, or otherwise to receive a certain amount of out door work for him at home, and in either case to save herself from the necessity of more persevering industry or of increased personal exertion. The Lord Ordinary cannot but feel that the present attempt, if successful, might lead to very unfortunate results in the administration of the poor-law. For it might lead to this, that immediately on a father's death the widow would be entitled at once to throw the whole children on the parish, whether able to support them or not."

The respondent reclaimed.

Macfarlane, was for the reclamer.

N. C. Campbell, for the respondent.

The LORD PRESIDENT. There is a presumption *juris et de jure* that an able-bodied father is capable of supporting himself and children. The law does not hold the same thing in regard to the mother. It depends on circum-

stances whether she is capable of supporting herself and children. The onus of proving her capable lies upon the parish: and I am not altogether satisfied that in this case they have succeeded in establishing it. At same time the refusal by the mother here of the relief tendered her, makes it doubtful whether I have come to a right conclusion in the import of the evidence. My feeling is that the parish have failed to establish that the mother is able to support her child: but that they have made an adequate tender of relief.

LORD FULLERTON. I have great doubts of the soundness of the view now taken of this case. I do not see why a mother should not be entitled to send her child to the workhouse and keep herself out of it. It comes to be a question whether or not these parties have made a proper offer of relief. I have great doubts about that. The mother although not able to support her child, may be able to support herself, and this appears to me to be the sound view of the case.

LORD IVORY. I cannot say that I have formed an opinion altogether satisfactory to my mind: and had the question been open, I should have been very much inclined to take the natural view expressed by Lord Fullerton. But it is impossible to shut ones eyes to what has already been decided. It goes to this, that if the mother is able to support herself but not her children, a distinction has been drawn between her and an able-bodied father, to the effect that the ability of the father to support himself, although attended with the admission that he is unable to support the children, makes it necessary to exclude relief even from the children, but that principle has not been extended to a mother. The children are not excluded from relief, but the mother and children are admitted to the poor-house together. Looking to this legal view of it, I do not feel myself able to say that this was not a sufficient offer. I am not able to differ, but I would like to do so.

LORD ROBERTSON. I come to the same practical result. After the case of *Watson*, 26th Feb. 1853, I think the party was *de jure* relieved by this offer.

The COURT: Find "that the tender made by the inspector and now adhered to, of receiving both the mother and child into the work-house is a sufficient tender of practical relief. . . . Therefore recal the interlocutor of the Lord Ordinary, . . . assoilzie the advocator, . . . find no expenses due," &c.

John Leishman, W.S., Petitioner's Agent.

Ross & Auld, W.S., Respondent's Agents.

(J. S. M.)

LOWSON & SON v. J. M'CLELLAND, (GEMMELL'S TRUSTEE.)

No. 266.

Relevancy—Obligation—Mercantile Liability.—Circumstances in which allegations held not relevant to establish a ground of responsibility by a mercantile firm in Glasgow for transactions entered into by them on behalf of foreign correspondents.

This was an appeal against a deliverance of the trustee on the sequestrated 1st Division. estate of Gemmell Brothers and Company, merchants in Glasgow, rejecting the appellant's claim to be ranked on the sequestration for the balance of the price of goods sent by them to William and Thomas Gemmell and Company, at Hong-Kong. The parties on whose order these goods were furnished, were the bankrupts directly, or through brokers acting for them, and on their responsibility. The trustee rejected the claim, on the ground that the bankrupts

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M'Kie v.
Baillie.

at Lowson, &c.
v. M'Lelland.

July 20. 1853. had no share or interest in the transactions referred to; that the concern of W. & T. Gemmell and Company was a separate and distinct concern from that of the bankrupts; and because there was no evidence of any liability on the bankrupts for that company, who were the proper and only debtors to the claimants.

Lowson, &c.
v. M'Lelland.

The appellants, by desire of the Lord Ordinary (Curriehill), lodged in process a draft issue of what they proposed to prove, and his Lordship thereupon reported the case. The proposed issue was as follows:—"Whether the said firm of Gemmell Brothers and Company held out and represented to customers dealing through them with the said William and Thomas Gemmell and Company, that the said William and Thomas Gemmell and Company was a branch house of the said firm of Gemmell Brothers and Company, or held out and represented their said firm as liable to customers dealing through them with the said William and Thomas Gemmell and Company, for the debts and obligations of the said William and Thomas Gemmell and Company; and whether the pursuers, Messrs John Lowson and Son, in reliance upon such representations, made the consignment foresaid to the said William and Thomas Gemmell and Company," &c.

The appellants' allegations were to the following effect:—That William Gemmell, the senior partner of the firm of Gemmell Brothers and Company, was, for many years prior to its formation, established in business as a merchant and commission-agent in Glasgow. He established branch houses in various places abroad, and among others, at Hong-Kong and at Canton in China, under the firm of William and Thomas Gemmell and Company, of which he and his brother Thomas Gemmell were the partners. That the Chinese house of William and Thomas Gemmell and Company was established with a view to the extension of the business of William Gemmell conducted in Glasgow, who by himself, and through his applications to his mercantile friends and connections in this country, procured for his Chinese house the whole of the consignments and business with which that house came to be entrusted, and it was by him (William Gemmell) that the whole business of the Chinese house in this country was transacted. That he represented to his mercantile customers and correspondents that W. & T. Gemmell and Company was a branch house, for all transactions with whom he was responsible; in consequence of which representations, and of his course of dealing above mentioned, it came accordingly to be understood and believed in the mercantile world generally, that the house of William Gemmell in Glasgow was responsible for all transactions entered into through it with the Chinese house of W. & T. Gemmell and Company; and parties in this country and elsewhere invariably transacted with the Chinese house through that of William Gemmell in Glasgow upon that footing. That in the year 1839, William Gemmell assumed M'Phun, his clerk, as a partner in his business in Glasgow, but still continued to carry on his business there for about a year longer, under the individual name of "William Gemmell," which, during that time, was the firm of the company. That in 1840 he assumed his brother Thomas Gemmell as a partner, along with M'Phun, in the Glasgow house, the business of which thenceforward was conducted under the firm of "Gemmell Brothers and Company." That in January 1842 Thomas Gemmell died,

but the Glasgow business, notwithstanding, continued to be still carried on July 20. 1853. by William Gemmell and M'Phun as partners, under the same firm of Gemmell Brothers and Company, until 1846, when M'Phun retired from it. ^{Lowson, &c.}
That these changes in the partnership arrangements of the Glasgow house ^{v. M'Clelland.} made no difference with regard to the footing on which that house invariably transacted business with parties in this country and elsewhere, on behalf of W. & T. Gemmell and Company in China. Gemmell Brothers and Company were even in the practice of guaranteeing all transactions made through them with their foreign correspondents, and a letter to the appellants was referred to as corroborative of this averment. That the mode of conducting business with the Glasgow house of Gemmell Brothers and Company, in relation to their China house of William and Thomas Gemmell and Company, was so generally known and relied upon by parties who agreed, on the solicitation of Gemmell Brothers and Company, to make consignments to China, that they uniformly transacted (directly or through their correspondents) solely with the Glasgow house of Gemmell Brothers and Company, to whose credit chiefly they trusted, and without any direct communication with William and Thomas Gemmell and Company in China. That upon the footing thus explained, the appellants had a variety of transactions with the bankrupts prior to 31st December 1846, in course of which they consigned goods to China through the bankrupts, to their house of William and Thomas Gemmell and Company, to be sold in China on behalf of the appellants; that the proceeds of these sales have not been accounted for; and the appellants pleaded that the bankrupts were liable therefor, having undertaken responsibility for all transactions negotiated through them with W. & T. Gemmell and Company.

Answers were lodged for the trustee, denying the statements of the appellants, and alleging that the bankrupts acted avowedly in the character of mere commission agents.

Penney, and the *Dean of Faculty*, for the appellants.

Mackenzie, and *H. Robertson*, were for the trustee.

The LORD PRESIDENT. I am not satisfied that there is relevant matter here sufficiently or specifically set forth, for granting an issue such as is desired. It is a great deal too general and vague. It is raising up a species of liability that is quite new. It is seeking to hold these parties interested not on the ground of any advertisement or sign over their door, but from something to be gathered from statements and expressions which are not explained, but which are said to imply liability. There is no precedent for this, and it would be hazardous to sustain such a statement to the effect of granting issues as desired. I cannot consider what is set forth as amounting to an undertaking at all, and therefore I am for refusing the appeal.

The rest of their Lordships concurred.

The COURT "Find that there is no relevant matter to support the proposed issue, and dismiss the appeal" with expenses.

W., A. G., and R. Ellis, W.S., Appellants' Agents.

Gibson-Craig, Dalziel, and Brodie, W.S., Respondent's Agents. (J. S. M.)

No. 267.

PETITION, JAMES HARPER.

Commissary Clerk—Interim appointment.

1st Division. This was a petition setting forth that the petitioner, who holds the office of
 July 20. 1853. commissary clerk of Banffshire, had been rendered temporarily unfit for fulfilling the duties of his office, in consequence of severe indisposition, and as he had no power granted in his commission to appoint a depute or assistant clerk, he had been advised to make the present application, praying the Court to appoint an interim commissary clerk until the convalescence of the petitioner, and suggesting an individual for the office.

Harper,
 Petitioner.

The Court ordered intimation of application to be made to the Sheriff of Banffshire and Lord Advocate. The Sheriff wrote in answer, that Coutts, the party proposed, was well qualified for the office; and the Solicitor-General having appeared at the bar and stated that he had no objections on the part of the Crown to the appointment—

The Court, "in respect of the emergency, and having heard the Solicitor-General on the part of the Crown, with a statement by the Sheriff of Banffshire, appoint the said William Coutts as commissary clerk of said commissariat *ad interim*, reserving to any party to move the Court again in this matter, and decern *ad interim*."

Wotherspoon & Mack, S.S.C., Petitioner's Agents. (J. S. M.)

No. 268.

A. v. B.

Divorce for Adultery—Condonation—Mora—Forum competens—Foreign.—Special circumstances in which an action of divorce for adultery was dismissed on account of the long period which the pursuer had, in the knowledge of the crime, allowed to elapse without seeking his remedy; and on the ground that, if action was at all competent to him, he ought to institute it in England.

Divorce for Adultery—Proof before Answer—Relevancy—Process.—In actions of divorce for adultery, a proof before answer ought to be refused, if the question of relevancy can previously be disposed of.

2d Division. This was an action of divorce for adultery, in which the main question was,
 July 20. 1853. whether the pursuer was not barred from insisting in it by the lapse of time, he having been in the full knowledge of the adulterous intercourse, and having, in consequence, lived separate from his wife for nearly fourteen years. The circumstances are fully stated in the opinion of the Court, which was delivered by—

A. v. B.

The LORD JUSTICE-CLERK. This is a case of great nicety. It is necessary, on the one hand, that we do not deny action for an undoubted wrong on grounds which are not strictly and judicially applicable to the character of the remedy sought, or which the proof in the case might not obviate; on the other hand, it is unquestionably a principle of the law of divorce, resting on considerations of social policy as well as on grounds applicable to the situation of husband and wife, that the remedy of divorce is to be resorted to under a sense of the wrong which gives rise to the remedy—that there shall not be such long-continued, and as it were, permanent indifference as amounts practically to *remissio*,—during which long interval, although there may have been no cohabitation, the husband has continued to his wife her *status* as such in

society, and accredited her as an unoffending wife. The facts here are very July 20. 1853. peculiar, and the minute which has been given in in explanation of the long delay has added greatly, in my opinion, to the nicety of the case. The A. v. B. adultery is said to have been committed in 1837-8-9, and it is stated that it was discovered in 1839 by the husband. It was committed, it is said, by his own brother. That fact, which added so grievously to the character of the wrong, might, no doubt, in one light, lead to great aversion to give publicity to such family dishonour. But in this case that consideration could not weigh much, for the pursuer had given information against his brother, who had been connected with him in some business in London, for embezzlement, and he was transported for ten years. Therefore, of reserve and secrecy for the credit of the family there could really be no feeling to which the Court can give weight. Then from the year 1829, if I understand §§ 2 and 3, the pursuer and his wife removed to and lived in England, and the adultery was wholly committed in England. Further, when charged with the adultery, the husband says the wife averred that the brother had effected his purpose by force, and a bill was presented to the Grand Jury with a view to his trial for that crime, when the wife was of course examined, but the bill was ignored on the ground of her consent. Hence, therefore, the veil was lifted from this scene of family dishonour. But this fact, that the wife had averred violence, and that the Grand Jury disbelieved her evidence, and threw out the bill, seemed to compel the husband to proceed against her for the divorce, since the adultery had thus been disclosed in the most revolting and degrading manner, and the wife's infamy proclaimed in a way which gave the husband no choice, if he ever intended to look to the remedy of divorce. He says he separated from her in 1839; but she continued to live in England, more or less, and he constantly, until October 1852. In December 1852 the wife came to Scotland, and the summons was served on her personally on 2d Feb. 1853, the husband, notwithstanding this long separation without any conversation with her, having full and immediate knowledge of this movement of hers coincident with his return to Scotland in October 1852, on the back of which this summons of divorce is raised and served. Now of this extraordinary delay the minute gives no satisfactory account. In the summons it was said, that after the brother's transportation he never heard anything of him, and knew not whether he was alive or dead. Now any convict could be at once heard of, as every one knows, with perfect accuracy, at the convict office. But in the minute it is said as if it were one of the reasons for now instituting the divorce, that the pursuer has only recently ascertained the place of the brother's residence in New South Wales, after he left the penal settlement to which he was banished. This is very vague and suspicious, especially as the offence was not one, according to the practice, involving a penal settlement. If it is intended to be said that it was after this action was instituted, and before the date of our order for a minute on 17th June, that inquiries were made, and the brother's residence ascertained; then, 1. There has not been time for such inquiries to be answered; but, 2. The ease with which the brother's residence was ascertained, when inquired after, only the more shews that if inquired after before, it could have been ascertained. This statement as to the brother was accordingly admitted not to be the part

July 20. 1853. of the explanation to which the pursuer attached importance. Then what explanation remains? He says he was preparing at Oxford to enter the church; that he has since been curate in different parishes, and tutor in private families; and that it would have been injurious to his prospects if he had proceeded in England against his wife; and he adds that his pecuniary circumstances hitherto prevented him. This is a statement of his own reasons for not proceeding; and in every case, however long the delay, some statement of the party's own reasons will always be made. But it is no such explanation of the cause of delay as in any degree whatever takes off from the weight and importance of that obstacle in point of law, if it is a serious obstacle. Indeed, I should say that after the bill against the brother for rape was thrown out on the ground of the wife's consent, and after he found that, on the contrary, adulterous intercourse had been carried on by her with the brother for three years, his own character required immediate recourse to legal remedies, and that, with a view to his present position, the present action is a much more awkward proceeding than proceedings at the time could have been. The statement as to his means, when he had a shop in London and was studying at Oxford, of course cannot be received as taking off the effect of the delay. Then, though the marriage was in Scotland, he does not, at the time, proceed in Scotland, nor does he proceed in England. The whole intervening period he spends in England,—at least, such is the import of the minute, for the statement in the summons of occasional appointments in Scotland is not repeated; and generally speaking, according to the minute, his residence was in England. This, then, becomes a case in which the effect of that long continued silence in England becomes one of the leading elements for consideration, and as to which, in law and practice, the Courts of England, where the adultery was committed, are, of course, fully competent to judge. The case of *Duncan v. Mailand*, 9th March 1809, really went on silence, for though after the information was first stated to the husband, certainly from a quarter little entitled to any credit at all, there had been nine months of cohabitation, neither of the Judges whose opinions are reported states that the husband must have believed that information; on the contrary, they seem not to believe the woman even on oath. Hence I must consider that case as going on the great delay which had occurred, and the report leads to the conclusion that such was the real ground of the judgment. But the facts here present much greater difficulties to entertaining this action in Scotland. In every question as to status arising out of the relation of husband and wife, the character of the acts of the party must be viewed with reference to the law of his residence and domicile. The husband was a domiciled Englishman, and resident generally in England, and belonging to the Church of England. His acts during this period cannot be viewed in reference to the law of Scotland, but ought to be viewed in reference to the law of England. If he would not be entitled to the remedy of divorce in England, I do not think he should obtain it here. Hence I am of opinion that we should dismiss this action in the whole circumstances of the case, leaving the party to proceed in England. I am in no degree moved by the plea that there are differences as to the remedies to be obtained, or as to the mode of obtaining them. If there had been a proper contradictor we might have ob-

tained—though I do not say I would have entertained the action even on that July 20. 1853. footing—the opinion of English counsel. But in a case of divorce, when the wife makes no other appearance than conveniently to follow the husband immediately to Scotland, I could not consent to let the case proceed on the footing that we might obtain the opinion of English counsel. It is a case appropriately fitted for the Courts in England, and to them we shall leave the pursuer for his remedy. It was urged on us to allow the proof to proceed, and we could then take up the point after the proof, and when more facts might be proved. I am directly against that course. 1. We have called on the party to account for the delay, and he stated all he can. But, 2, I think considerations of public policy render it improper to have the facts of adultery proved and then to refuse to entertain the action, if the question *can* previously be disposed of. We are not sitting on a review by advocacy of a case from the commissaries, as in *Duncan v. Maitland*. We can now decide whether there are grounds for entertaining the action or dismissing it, and that point being fully and satisfactorily before us, I think it would be highly objectionable to allow the adultery to be established before answer, and then to consider whether we should not dismiss the action. When condonation is pleaded, it may be impossible to dispose of that plea till the facts are proved. It is never admitted, and the full effect of it can only be judged of when the character of the facts proving adultery is disclosed. But in such a case as this, I am aware of no precedent for allowing the adultery to be proved before answer. Indeed the difficulties, if serious, go to the dismissal of the action. They are now fully raised, or can now be raised, if more explanation could be stated; and, as the case stands, I am decidedly of opinion that the action should be dismissed. The case, however, depends very much on its own peculiar and distinctive specialties.

Shand, and *Dean of Faculty*, were for pursuer.

The COURT “in the special circumstances of the case, refuse to sustain the action, and dismiss the same.”

James Burness, S.S.C., Agent.

(J. M. M.)

THE COURT ROSE FOR THE LONG SUMMER VACATION.

CASES DECIDED

IN THE

HOUSE OF LORDS.

FERRIE v. FERRIE.

No. 1.

Agreement—Contract—Construction—Consent.

This was an action raised at the instance of the appellant against his brother, the respondent, to have it found and declared that the respondent had agreed, Nov. 23. 1852. to allow the appellant one-fourth share of the means and estate left by their Ferrie v. Ferrie. deceased father in place of an annuity of £125, which was provided to the appellant by the father's deed of settlement. The late Robert Ferrie, the father of the parties, died on 17th January 1845, leaving four children,—George, (the respondent,) Peter, (the appellant,) and a third son, William, besides a daughter named Christian, married to Mr Charles Atherton, and having by a trust-disposition and settlement, dated 11th July 1837, conveyed his whole property, heritable and moveable, to trustees for the purposes therein specified. The leading purposes of the trust were, that the trustees should hold the testator's heritable subjects, with the exceptions therein mentioned, until the eldest of his grandchildren, if any, should attain the age of twenty-one years, or in case of no grandchildren, for nineteen years from the date of the trust-deed, in order that the same might be then, but not sooner, sold and divided among his children and their successors, in terms of the destination in the settlement. The residue of the trust-estate was appointed to be made over to the respondent, George Ferrie, or his successors, to the extent of one-half, another fourth share was allotted to William Ferrie, or his successors, and the remaining one-fourth share of the residue was destined to the trustees under the contract of marriage between Christian Ferrie and Charles Atherton. The share of the trust-estate destined to the respondent was burdened with an annuity of £100 for the first five years, and £125 thereafter, to the appellant, his wife, and any children he might have,—the annuity, however, to the children being redeemable on payment of £2,500. On Mr Ferrie's death, it was found that his personal debts were large, and it was considered by the trustees to be imprudent and impracticable to delay the sale of the properties until the period contemplated by the deed of settlement had arrived. They were, therefore, very unwilling to accept the trust, and recommended a deed of arrangement being entered into by the children, by which a title to the whole properties might be made up by the respondent, as the eldest son, and the least productive property sold. A deed of agreement was accordingly prepared, and was sent out to America to the appellant for his signature. The appellant, who was dissatisfied with the provisions made for him by his father, and was anxious to have a fourth share of the estate instead of the annuity, very reluctantly signed the deed of agreement, but he did so by the persuasion of Mr Atherton, who was in America at the time. Before executing this

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deed, the appellant altered it to the effect, that when the trust-estate came to be realized, the share of the residue in which he was interested was to be vested in his marriage-contract trustees, instead of his brothers and Mr Atherton, as originally proposed. The deed stood originally thus: "*and in the event of such sale taking place before the expiry of the said nineteen years, the share and proportion of the price thereof accruing and belonging to us, the said Christian Ferrie or Atherton and Charles Atherton, or the survivor of us, shall be paid and be payable to the accepting trustees under our marriage-contract before mentioned; and the share and proportion of the said price in which I, the said Peter Ferrie, am interested, will then be invested either in good heritable security or in the funds, as the majority of us shall determine, so as to secure me, my wife, and children, in the event of any existing, in a life rent annuity, as provided to me and them by the foresaid deed of settlement, to the extent and under the conditions, provisions, (and limitations), declarations, restrictions, and limitations therein specified, and the capital sum thereof shall be destined in manner particularly mentioned in the said deed of settlement; and also, that the shares and proportions of the said price accruing and belonging to us, the said George Ferrie and William Ferrie respectively, shall be paid to us respectively, or otherwise invested in such way as each of us may direct.*" The clause in italics was deleted by the appellant, who substituted the following in the form of a marginal note, "*shall be paid and payable to the said Peter Ferrie, and the accepting trustees under the marriage-contract between me and Elizabeth Atherton or Ferrie, my wife, for fulfilment of the obligations specified in the said marriage-contract, the said share and proportion to continue in other respects, in terms of the said trust-deed of settlement, until said payment.*"

The deed of agreement, so altered and executed by the appellant, was returned to this country with a joint letter, dated 28th April 1845, and signed by the appellant and Mr Atherton, and addressed to the late Mr Ferrie's trustees. The letter concluded as follows:—"The only corrections made on the deed being to the effect, that Peter Ferrie's interest in the estate shall, when realised, be vested in the hands of the trustees appointed by his marriage settlement with Elizabeth Atherton, his wife, instead of being subject to the control of his brothers and Charles Atherton. It is presumed by the undersigned that this correction will be satisfactory to all parties, as it removes the partial position, in respect to other members of the family, in which Mr Peter Ferrie would otherwise be placed, by his interests being subjected to the control of his brothers, whilst theirs would not be reciprocally subject to him; and, moreover, his wife having an interest in the realised proceeds under her marriage settlement, it seems to us inexpedient that an additional set of trustees should be introduced; also, the proposed correction is more in accordance with the arrangement to which Mrs Atherton's interest is subject."

"We have accordingly, by this post, returned the deed of agreement to Messrs Peebles and Campbell, duly executed by us as proposed, that the same may be completed by the remaining members of the family and acted upon.—We are, &c., CHARLES ATHERTON, PETER FERRIE."

However, on the same day, viz., the 28th April 1845, the appellant wrote to Mr Atherton the following letter:—"Before executing the deed of agreement which has been sent us from Scotland relative to my deceased father's

estate, it is proper to state that I have been induced to do so on the express understanding, that, as the trust-deed is thereby annulled, George will award to me, on the allocation of the property, the fourth share of my father's estate and its proceeds, it being clear, from the terms of the deed of settlement, and all of us being conscious my father would have done so were he now alive and entering into the arrangement now made, the estimated proportion specifically bequeathed to me by the trust-deed having been made solely for the purpose of excluding me from the management of the trust, in the event of its being continued; George is therefore bound, in honour at least, if he considers me as his lawful brother, to mete to me this justice. Were I, before executing this deed of agreement, to make a legal question of it, I would be entitled to succeed, for it is well known, that in all questions relative to testaments, unlike all others, the meaning and intention of the testator is invariably given effect to, and not the literal meaning and construction of the words themselves. I have partially altered the deed of agreement to the above effect, but cannot, without spoiling the deed, do so fully; and, as there is no time to communicate, I am under the necessity of leaving the matter, as it is, in your hands, as mediator, to get this arrangement effected between George and myself. I remain, &c., PETER FERRIE."

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There was no evidence to shew that this letter was ever transmitted to the respondent, but Mr Atherton, upon his examination, deponed, that though he had no recollection of having ever sent such letter, or a copy, to the respondent, he had no doubt that he communicated to him the substance thereof, and particularly in a letter of the 12th May 1845, written from Rochland Lake, State of New York, by the respondent, on the 20th June. The following are the passages in the letter which relate to this matter:—"Peter has at length been brought round better than I had at first any hopes of being able to effect. He took a most erroneous and painful view of the settlement, considering himself as being 'cut off from all interest in the property, with a small annuity.' On his receiving the deed of agreement, I was fortunately at New York. Christina and myself accompanied him home, and spent ten days with them, and I am in hopes he is now more reconciled to the settlement. For my own part, I am perfectly satisfied that his father considered the annuity of £125 per annum as the full fourth share, and that he put Peter on the footing of an annuitant, merely to prevent his litigious disposition from interfering in the management of the estate. In fact, I believe Peter to be better off than any of us; by the alteration made in the deed of agreement, Peter's interest, when realised, is to be paid to his marriage-contract trustees, which you will doubtless concur in as the best plan. After all, I could only procure Peter's signature to the deed of agreement, on the assurance that I would endeavour to prevail on you to compromise with him for his receiving a fourth share instead of the annuity, to which surely you can have no objection, *considering the HAZARDS* of realising anything like the real value of the property. As one of the trustees under Elizabeth's marriage contract, I do not consent that, in the case of Elizabeth surviving him, she shall incur the *RISK* of Peter's demand, but receive her *fixed* £100 per annum. For the peace of the family, as well as in justice to yourself, *close with Peter at once*; give him his one-fourth share instead of the annuity of £125 per annum, *be the same more or*

Nov. 23. 1852. *less*, as the lawyers say. Get Peebles and Campbell to draw up the agreement, and send it by return of post, executed by yourself. I congratulate you on getting rid of the annuity on such terms."

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There were subsequent letters from Mr Atherton to the respondent, dated respectively the 26th May and the 12th July 1845, to a similar effect, and one so late as 28th July 1845, which contained the following passage :— " You don't say anything about your acceptance or non-acceptance of Peter's proposal to compromise his annuity with you for a one-fourth share, but probably you have written to him upon the subject." The deed of agreement was executed by the respondent and his brother William on 20th May 1845, and was immediately afterwards acted upon. Mr Atherton, on his examination, further stated, that he never received or got any answer from the respondent either written or verbal to any of these letters. There was a letter, however, from the appellant to the respondent, dated Princes' Bay, Staten Island, 27th June 1845, and received by the respondent on the 15th July 1845, in which letter the appellant alluded to the trust-deed and deed of agreement as follows :— " Since, however, that deed (the trust-deed) has been departed from, the estate wound up, and important restrictions affecting your and William's shares, in particular, were to be annulled, it appeared to me just and reasonable that I should be dealt with on an equal footing, as my father would doubtless have done were he now alive and annulling his trust-deed ; I, therefore, before subscribing the agreement, wrote Charles a letter containing my views, and the proviso I made in regard to it. You know, George, I am no bastard, and that there is no reason for my being treated as one ; but I have no fears you will act thus towards me. At first it appeared to me that although the provision made me by the deed might, at its date, have been equivalent to a fourth part, but that, from the great rise of the property since then, it would not be so now ; it therefore became a fair subject for treaty between us, before I agreed to any alteration for your benefit, and probably to my serious injury, that a new apportionment should take place. It would, however, appear from Peebles' and Campbell's communications to me, that my provision will be equivalent to a fourth share ; if so, or even it be at all near the mark, I have nothing to say, and would not think of disturbing the matter as it now stands." The following is the answer to this letter, which the respondent sent to the appellant :— " Dear Peter, the pleasure that I have received from your letter to me is more than I am able to express. I cannot allow the few minutes to pass that is within my power of the present mail, without acknowledging the receipt of yours of the 27th. I cannot enter into detail about our father's will. I hope, my dear brother, we are as one in *flesh and blood*, without taking upon ourselves to use the word *bastard*. Our dear father, as you especially call my attention to it, his peace of mind must have been of such a nature, that no *child* of his but must feel the deep parental feeling that he had to combat with in the situation that he was placed in. I thank you, my dear brother, from the heart, for your affectionate feeling towards me. I think you know me too well to allow that my nature and principle would act with me in swerving from the just and true principle which alone has borne me out till this time, and I hope will be so to the last. I need say no more than I said to Charles, in answer to his. I had never given advice in our family affairs, nor would

I do it now, as I had come through so much, that I looked upon family dissensions with such disgust, that I would on no account enter upon it. I need not say to you the state of mind that I was in, left, as I was, without a single one to act, with such an overwhelming *debt*, and the property tied up. I can only assure you, had it not been for the unwearied kindness and support of those friends, and Mrs Ferrie, I would have sunk under it; but I hope, in the kindness of the great Ruler over all, that our dear father's debts will all be paid, and a reversion to his children. I cannot say too much in Mrs Ferrie's praise, and, for myself, I hope I will never be so far lost to as to forget her. I will write Lizzy by and bye. Tell her to write me often, and not mind me. I am, &c.

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The respondent by his fourth plea, denied having ever agreed to account to the appellant for a fourth share of the residue of the trust-estate. The Lords of the Second Division, after taking the opinions of Lords Mackenzie, Fullerton and Cuninghame, Judges of the First Division, pronounced an interlocutor, (Lord Justice-Clerk, and Lords Medwyn, and Cuninghame, dissenting), by which they sustained the respondent's fourth plea, and assoilzied him from the conclusion of the summons for payment of one-fourth share of the father's means and estate. From this interlocutor, the present appeal was taken.

Bethell, Q.C., and *Anderson*, Q.C., for the appellant, contended, that on the deed of agreement, as altered, and the correspondence between the parties, taken together, the respondent was bound to allow the appellant a fourth share of his father's estate, in place of the annuity.

The *Solicitor-General for England*, and *Biggs Andrews*, Q.C., who appeared for the respondent, were not heard.

The LORD CHANCELLOR. My Lords, under the original deed of settlement, the appellant had an annuity for his life, charged on the share which the respondent took under the deed, and redeemable on payment of a sum of L.2,500. This will explain much that has been relied on in different parts of the correspondence. It was afterwards discovered that the estate was so encumbered, as not to be able to pay the debts, unless the period of division was accelerated. A deed of arrangement was accordingly prepared, but without previously consulting the appellant, and Mr Atherton. This deed, my Lords, authorised the sale of the estate, but it did not alter the father's settlement, but left the rights of the parties to the property as they were under the settlement. The arrangement was made for the benefit of all the family, and it was as much to the advantage of the appellant, Peter Ferrie, as to that of George Ferrie, that it should be made. The deed was received in America for approval, by persons competent to deal with it; for no one understood it better than Mr Atherton and the appellant did. Mr Atherton did all he could to induce the appellant to execute it as it stood. The deed however was altered, but there is nothing in the deed, as altered, which would give the appellant what he now seeks to have; although it reserves to himself his right, it does not, in fact, give him more than he had before. What claim, my Lords, had he to alter the terms of his father's settlement? None whatever; except that he was discontented with it. Mr Atherton was anxious that the deed of arrangement should be signed by the appellant, and he promised him

Nov. 28. 1852. that he would endeavour to effect an arrangement for him with the respondent. It was agreed therefore, that there should be two classes of letters written, and it is only necessary, my Lords, to read these letters written at the same time, and probably in the same room, to see the intention of the parties. In the letter to Atherton the appellant says, "I have been induced to execute the deed on the understanding that George will award to me the fourth share of my father's estate. George is bound, in honour at least, to mete to me this justice," and he concludes the letter with saying, "I am under the necessity of leaving the matter as it is in your hands, as mediator, to get this arrangement effected between George and myself." Now, contrast that letter with the letter from the appellant to Messrs Peebles and Campbell, and the two letters conclusively shew, that the deed was executed by the appellant in the sense in which it was originally sent to America to be executed by him. The appellant, whilst he reserved to himself this right which he claims, took care to send the deed back, accompanied with such letters as should induce the parties in Scotland to act upon the deed as if no alteration had been made in it. Mr Atherton was examined as to the communications he had with the respondent, on the subject of Peter's letter to him of the 28th of April 1845, and he was under the necessity of saying, that he never did receive from the respondent, George Ferrie, any letter in reference to such letter of the 28th April, or the proposal therein contained. Being shewn the letters written by him to the respondent of 12th May, 26th May, 12th July, and 28th July 1845, he was thus interrogated, "You are requested to state whether in answer to these letters, or otherwise, you ever received from the defender, George Ferrie, any letter or other written communication consenting or agreeing to allow the pursuer one-fourth share of his father's succession." His answer was, "I did not receive, and could not get any answer from George Ferrie, either written or verbal, to any of the letters referred to." Now, my Lords, what does all this amount to, but that the mediation was undertaken by Mr Atherton to procure the consent of George to Peter having one-fourth share, in lieu of the annuity, and that it failed. The appellant and his agent never were able to extract from the respondent any admission favourable to the case of the appellant. There is, my Lords, also a correspondence between the appellant and the respondent, but that also does not assist his case. [His Lordship here read the letter from the appellant to the respondent, dated 27th June 1845.] He there tells his brother, that being told by Messrs Peebles and Campbell that his annuity might be about equivalent to a fourth share, he don't desire to disturb the matter as it stands, if that is so, "or even if it be at all near the mark." He does not say that he desires to enforce a contract which it was in his power to have executed, but only to ascertain what is the value of his interest. The answer of the respondent is certainly evasive, and reflects great discredit on him, but we are here, my Lords, only on questions of law. It is clear that the deed gives no pretence for the appellant's claim, and though it might have been an important question what would have been the effect of the correspondence, if it had taken a different turn from what it has done, the matter does not now arise, and I therefore move your Lordships that the interlocutors complained of be affirmed.

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LORD TRURO concurred.

Interlocutors affirmed with costs.

Deans and Rogers, Agents for the Appellant.

T. W. Webster, Agent for the Respondents.

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FERRIE v. FERRIE, AND OTHERS.

No. 2.

Trust-Deed—Interest, Heritable or Moveable—Conversion—Interim Rents.—A truster conveyed his heritable subjects to trustees on trust, to hold them until the eldest of his grandchildren, if any, should attain the age of twenty-one, or in case of no grandchildren, for nineteen years, from the date of the deed, in order that the same might be then, but not sooner, sold and divided among his children, and their successors. After the truster's death, in order to create funds for the payment of his debts, the beneficiaries entered into a deed of arrangement, by which they agreed that a certain portion of the property should be sold immediately, and applied in payment of the debts. As to the remaining properties, it was agreed that the rents until sale, should be divided amongst the beneficiaries, according to the deed of trust, with a power of sale, if at any time it should be necessary to do so, and a clause, that in the event of the same not being sold before the nineteen years, that the same should then be sold, whether there were grandchildren of the truster, or not. One of the beneficiaries, who was a party to this deed, died before all the property was sold:—*Held*, that his share of the trust estate was moveable, but as there was no absolute conversion of a portion of the property, until after the nineteen years had elapsed, the rents, in respect of such, until that period, went to his heir-at-law.

This was an appeal against an interlocutor of the First Division of the Court of Session, made in a process of multiplepinding, raised by George Ferrie, one of the respondents, in order to have it determined, to whom belonged the share of the late Dr William Ferrie, in the trust estate of his father, Robert Ferrie, of Blairtumnock.

Mr Robert Ferrie died in January 1845, leaving a widow, and four children, viz., George Ferrie, his eldest son and heir-at-law, Peter Ferrie, the appellant, the since deceased Dr William Ferrie, and a daughter, Christian, who was married to a Mr Atherton. Several years before his death, viz., in July 1837, Mr Robert Ferrie executed a trust-disposition and settlement, whereby he disposed and conveyed all his means and estates, both heritable and moveable, to certain trustees, for the purposes, *inter alia*: *Fifth*, To hold and retain his heritable subjects, with the exceptions therein mentioned, until the eldest of his grandchildren, if any, should attain the age of twenty-one years, or in case of no grandchildren, for nineteen years from the date of the trust-deed, in order that the same might be then, but no sooner, sold and divided among his children and their successors, in terms of the destination in the settlement as therein mentioned: *Sixth*, To divide and pay, after the expiry of five years from the date of the deed, the free annual residue of the trust-subjects, and proceeds of the same, "one half or two-fourth shares thereof, to the said George Ferrie, and his successors, and one-fourth share thereof to each of William Ferrie, (his son), and Christian Ferrie, (his daughter), and their successors respectively, the said Christian Ferrie's share being payable to the foresaid trustees under the contract of marriage between her husband Charles Atherton (formerly residing at Woolwich, now in Devonport), and her, in the terms, and for the purposes, and under the conditions and restrictions therein written:" *Eighth*, To divide the free proceeds of the whole trust-

Nov. 26. 1852. *Ferrie v. Ferrie, &c.* estate, heritable and moveable, which was to be held under trust as mentioned in the fifth purpose of the deed, "to and in favour of the said George Ferrie, or his successors, of one-half or two-fourth shares of the same; and of the said William Ferrie, or his successors, of one fourth share thereof, and of the said trustees, or trustee under the foresaid contract of marriage between the said Christian Ferrie and Charles Atherton, of the remaining one-fourth share of the said residue, and reversion for the use and behoof of the said Christian Ferrie and Charles Atherton, and the survivor of them," &c.

Upon Mr Ferrie's death, it was ascertained that his whole house property was very heavily burdened with debt, and that his personal estate was altogether insufficient to meet his ordinary personal debts. Under these circumstances a deed of agreement was entered into by the parties interested in the trust-estate; that is to say, George Ferrie, Peter Ferrie, the late Dr William Ferrie, and Mr and Mrs Atherton, there being no grandchildren of the testator. The deed commenced by reciting, that in consequence of the peculiar terms and tenor of this trust-disposition and deed of settlement, which seemed to confer no powers upon the trustees to sell any part of the heritable properties belonging to the testator, which formed the principal portion of his estate, excepting that situated at Carlton Place, until the expiry of at least nineteen years from the date of the said trust-disposition and deed of settlement, and for even a longer period, on the occurrence of the events therein specified, and also of there being no funds at present available, or likely to be for some time, for the payment of the testator's personal debts, the trustees were therefore, and for other good reasons, unwilling to accept of the trust. And after setting out other recitals, the deed contained the following recital, viz., "We are therefore decidedly of opinion, that at least a large portion of the heritable properties should be immediately sold and disposed of, and the whole price and proceeds thereof, together with the prices and proceeds of the moveable property left by the deceased, excepting always that portion thereof conveyed to me, the said George Ferrie, or as much thereof as will be necessary, be applied in payment of the personal and heritable debts due by the deceased, and that the balance, if any, as well as the whole free rents and profits of the heritable property, which shall then remain unsold, and falling due from and after the term of Whitsunday next, should be paid and divided amongst us, in the shares and proportions, and under the provisions, conditions, declarations, restrictions, and limitations, contained in the foresaid trust-disposition and deed of settlement."

It was then provided and agreed by the deed, that George, the eldest son and heir, and failing him, the others in their order, should make up titles to all the heritable property, with power to borrow money on it to pay off debts; and by the second head of the agreement, it was provided that, whether it should be found necessary to borrow money for the purposes aforesaid or not, the heritable properties belonging to the deceased, situated in Saint Vincent Street, Renfield Street, and Carlton Place, should immediately, after the title thereto was made up in manner aforesaid, or as soon thereafter as could be, be sold and disposed of, either by public roup or private bargain, as might be deemed at the time most advisable, and the whole price and proceeds thereof, or as much as might be necessary, should be applied towards the payment

and discharge of the personal and heritable debts due by the deceased. The Nov. 20. 1852.
 fourth and fifth heads of the said agreement were as follows :—" *Fourth*, That
 the whole of the free rents and proceeds of the remaining heritable properties, ^{Ferrie v. Ferrie, &c.}
 situated in Buchanan Street and Gordon Street, becoming due and payable
 from and after the term of Whitsunday next, and so long as the same shall
 remain unsold, shall be divided and paid amongst us, in the shares, divisions,
 and proportions and under the deductions, and with and under the whole
 provisions, conditions, burdens, declarations, restrictions, and limitations specified
 or referred to in the foresaid trust-disposition and deed of settlement,
 and partly above narrated, which is hereby referred to and held as repeated.
Fifth, That immediately after the sale of the said whole heritable and move-
 able property above mentioned, in manner before specified, and of the prices
 thereof being applied in manner foresaid, I, the said George Ferrie, or which-
 ever of us in whose person the title shall have been made up in manner foresaid,
 shall be bound and obliged to dispoise, assign, and convey the said remaining
 heritable property in Buchanan Street and Gordon Street to myself, himself,
 or herself, and the said Peter Ferrie, Christian Ferrie or Atherton, William
 Ferrie, and Charles Atherton, and the survivor of us, and the heirs of the
 survivor, a majority of the survivors being a quorum, in trust always, for
 behoof of us respectively and our foresaids, in the shares and proportions,
 and under the deductions, and with and under the whole conditions, provi-
 sions, declarations, restrictions and limitations contained in and expressed
 in the foresaid trust-disposition and deed of settlement, but so far only, how-
 ever, as the same are not at variance or inconsistent with the provisions and
 conditions herein before and after written."

By the sixth head of the agreement it was provided, that if at any time it
 should be considered necessary or advisable to dispose of the said whole re-
 maining property, a majority of the said trustees should be entitled to do so,
 and that the shares and proportions of the price accruing and belonging to
 the respective legatees should be paid to them, or otherwise invested, in such
 way as each of them might direct. And the seventh head was in the follow-
 ing words, viz. :—" In the event of the said property in Buchanan Street and
 Gordon Street not being so sold and disposed of before the expiry of the said
 nineteen years from the date of the deed of settlement as aforesaid, in that
 case it is agreed and conditioned amongst us, that immediately after the ex-
 piry of nineteen years from the date of the foresaid deed of settlement, whether
 there shall be children born to or by us, or either of us, or not, the said pro-
 perty shall then be sold and disposed of by public roup or private bargain, as
 may be deemed advisable, and at such prices as can be obtained for the same;
 and we, or the survivor of us, shall be bound to execute and deliver valid
 and sufficient dispositions and conveyances, or other deeds and writs neces-
 sary to the purchasers or purchaser, for rendering his or their title complete,
 and the whole price and proceeds of said sale, after deducting all debts, bur-
 dens, and incumbrances affecting the said subjects, or the deceased's estate,
 and expenses of sale or otherwise, shall be paid and divided in the shares
 and proportions, and in the manner, and under the conditions particularly
 mentioned in the immediate preceding article, being article sixth hereof."

The deed of agreement was afterwards acted upon by the parties, and a

Nov. 26. 1852. title was made up by George Ferrie to the heritable properties, and several of the properties were accordingly sold. After part of the heritable property had been so sold, the said Dr William Ferrie died, without issue, leaving a trust-deed of settlement executed a few days before his death. By this settlement he conveyed to trustees, of whom the respondents in this appeal were the acceptors, all his property, and in particular his share and interest in his father's trust-estate for the purposes therein mentioned. The deed having been executed on deathbed was insufficient to convey heritage. The question arose, to whom did Dr Ferrie's share and interest in the residue of his father's trust-estate belong? George Ferrie claimed the whole, on the ground that the share had never vested, and therefore had accrued to him, in virtue of a special clause in the trust-deed; whilst the appellant and respondents both maintained that it had vested, but the respondents claimed it as moveable property falling to them under the provisions of the settlement made by Dr Ferrie for distribution and division, whilst the appellant, Peter Ferrie, in the character of Dr Ferrie's heir-at-law, claimed it as heritable. The case came to be advised, upon the report of the Lord Ordinary, by the First Division of the Court of Session, who pronounced the unanimous decision that Dr Ferrie's share had vested, and that it was moveable in its nature, and so carried by his settlement. Against this judgment Peter Ferrie entered the present appeal, but his brother George acquiesced therein.

Bethell, Q.C., and *Anderson*, Q.C., for the appellant. The share of Dr Ferrie was heritable, and passed therefore to the appellant as his heir-at-law. *De facto* the fund *in medio* is real estate, and there is nothing either in the trust-deed of his father, or the deed of agreement that was entered into by the parties, to alter its character as such. The testator, Robert Ferrie, had no grandchildren, and it is submitted that the fifth clause of the trust-deed contains no positive direction to sell, so as to convert the right of his children to a mere right to call for an account of the proceeds of the trust-estates; but that the clause is only a power to the trustees, in their discretion, at the period there mentioned, to sell for the purpose of paying off the debts which may affect the heritable estate. Even supposing there is a conversion under the trust-deed, the deed of agreement was an election by the parties that it should not be so carried out. The object of that deed of agreement was only to accelerate the power of sale given by the will, for the purpose of paying the debts. The Buchanan and Gordon Street properties have not, in fact, been sold, and remain heritage *de facto*, and by the fifth clause, George Ferrie is bound to convey them to the parties to the deed, and the survivor of them, and the heirs of the survivor. The LORD CHANCELLOR. How do you reconcile the seventh clause with his fifth clause? The seventh clause is only a power to be resorted to, if the beneficiaries should determine that the properties should be sold, and instead of being conveyed to them as provided by the fifth clause. If there be a conversion before the nineteen years have expired, from that time the conversion will take place, but if the only conversion is fixed to take place at the expiration of nineteen years, then, until that period has arrived, the property remains heritable, and liable to descend as such.


Rolt, Q.C., and *Dunlop*, for the respondents. In the first place, it is sub-

mitted, that under the original trust-deed of settlement, Dr Ferrie's share was Nov. 26. 1852.
 moveable. There was contained in that deed a trust for sale, and if there be such, although the language may import only a power, and although the intention of the settler may appear to be a sale for payment of his debts, yet, if the legatee is to take the surplus after such sale, he takes it as personalty, *Angus v. Angus*, (4 Shaw, 279); *Burrell v. Basherfield*, (11 Beav., 525). In the next place, whether the share under the trust-deed was heritable or not, the deed of agreement manifested an intention on the part of Dr Ferrie to convert it into personalty, and slight circumstances are sufficient for such purpose, *Biggs v. Andrews*, (5 Sim., 424); *Cookson v. Cookson*, (12 Clk. and Fin., 121). The seventh clause shows that, at all events, at the end of the nineteen years, the property was to be converted into personalty; this, which was therefore to be its ultimate destination, forms a key to the whole, and affects the character of property during the whole period, so that the interim rents follow as personalty.

Bethell, in reply, contended, that the parties to the deed of arrangement not being the absolute owners of the property, could not change its character so as to affect their children. On this point *Rolt* was heard in answer, and he urged that it had been admitted that the parties had the power of dealing with the property by the deed of agreement, and the appellant was estopped from taking this objection.

The LORD CHANCELLOR. This case, my Lords, has been elaborately argued, and it depends on the construction of the deed of agreement which was entered into between the parties. With respect to the question as to the rents of the unsold property before the period for division has arrived, I advise your Lordships not at present to dispose of it. My Lords, by the deed of agreement, the parties assume to themselves a power to alter the original deed of settlement, so as to enable them to sell the properties at a time when, according to the original instrument, they were not saleable. I shall assume therefore, that by the deed of agreement, the parties were enabled to dedicate the property in the way they thought proper, and I observe, my Lords, that the learned Judges of the Court below were all of opinion that the deed of agreement was a binding deed, and there has been no appeal on that point. This however still leaves open the question as to the construction of that deed. The parties to that deed desired to accelerate the period of sale, because there were debts of the testator which were pressing. It must certainly be admitted, that in the recitals they do not express an intention of disposing by sale of the whole of the properties, but in the operative part of the deed, they divide the properties into two classes; under the first class is certain heritable property which was to be sold immediately, and converted into money, and it is perfectly clear, that that is an absolute conversion of such property, and according to the decision of the Courts, it is a conversion from the time of the execution of the deed. Now, my Lords, as to the second class, the way the parties deal with the property in that class, was this, they said, that until such property was sold, the rents and proceeds of it should go according to the provisions of the trust-deed of settlement. Until the death of any of the parties to the deed of agreement, it was altogether an indifferent matter, whether the property was

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changed in its character or not, but the death of one of them has raised this difficulty. The fifth clause of the agreement says, that immediately after the sale of the properties comprised in the first class, or, in other words, as soon as the same has been sold, and the debts of the testator paid thereout, then there shall be a conveyance of the property in the second class to the persons interested therein, according to their rights under the original trust-deed, but with this material *proviso*, viz., so far only as the same were not at variance or inconsistent with the provisions of the deed of agreement. Now, what comes afterwards is this, the parties anticipated that a sale of the property comprised in this second class, might be desirable; accordingly, the sixth clause gives an absolute power to the majority of the parties to sell such property, notwithstanding the fifth clause. It is clear, therefore, that this property might be sold, whether necessary or not, and from this moment, such sale should take place, the property would become at once impressed with the character of personalty. Then comes the seventh clause, and that says, that immediately after the expiry of nineteen years from the original deed of settlement, whether there be children or not, the property in the second class, if not sold before, is then to be sold. The parties have so far bowed to the testator's will, that this property might in some event remain for nineteen years unsold, but then at all events, the property is to be absolutely sold; therefore, from that moment, the property is impressed with the character of personal estate, and the result is, that the decision of the Court below is right, so far as regards the *corpus* of the fund. But, my Lords, I do not entertain the same opinion as regards the intermediate rents. I do not think that there is anything in the deed of agreement, which, by implication, gives them to the parties, and therefore until there has been a sale, the rents will go upon the death of the parties, to their real representatives. As this point was not taken in the Court below, I do not advise your Lordships to dispose at once of this point, in order that I may consider the matter.

On a subsequent day, (30th November), the Lord Chancellor, after stating that the question as to the intermediate rents had been reserved, in order that the documents might be examined, said, I have since looked at the documents with great care, and I think it far from clear, that there was an absolute conversion under the original deed of settlement; it is clear, however, that the case depends upon the second deed, and in that I do not find an absolute conversion before the period of nineteen years, though there may be one before then, if there should be a sale. I think, therefore, that although this point had escaped the attention of the learned Judges in the Court below, until such time arrives, there is no conversion, and therefore, I move your Lordships, that the interlocutor be affirmed, with this variation, that it should contain a declaration, that there is no absolute conversion as to the Gordon Street property, until the period of nineteen years has arrived, unless before then an actual sale shall take place, when a conversion will occur.

Interlocutor affirmed with such variation, and without costs.

Deans and Rogers, Agents for the Appellant.

Grahame, Weems, and Grahame, Agents for the Respondents.

GEILS v. GEILS.

No. 3.

Divorce in Scotland after a decree for separation in the English Consistorial Court—Jurisdiction, application to amend appeal closing the record—Defences, dilatory, or on the merits.—The wife of a domiciled Scotsman being sued by her husband in the Arches Court in England for restitution of conjugal rights, put in a responsive allegation, charging the husband with adultery, and praying for a separation. The Arches Court accordingly decreed a sentence of divorce *a mensa et thoro*. The wife having afterwards raised an action in the Court of Session in Scotland for a divorce *a vinculo matrimonii* founded on the same acts of adultery, the husband pleaded as a bar to the same, the sentence of divorce obtained in the Arches Court:—*Held*, That the wife had not, by obtaining the divorce in England, lost her right of action in the Scotch Court for a divorce *a vinculo matrimonii*, and that the plea was therefore bad.

Query, Whether the effect of the responsive allegation by the wife was to make her an institutor of the suit in the Arches Court.

The Court of Session disposed of this plea at once before the record was closed, and gave no leave to appeal; this House afterwards held the plea to be a defence upon the merits, and therefore refused to dismiss the appeal on that ground. *Query*, Whether therefore the plea was such that the record ought to have been closed, pursuant to 6 Geo. IV., c. 120; but, *per Lord Truro*, even if it be a matter of right that the case should be remitted, by reason of the record not having been closed, yet the application for such purpose should be made at once, and it is too late after the appeal has been partly heard. The wife was an English lady, and the marriage was solemnized in England, and the husband on these grounds pleaded also a want of jurisdiction. The Lord Ordinary repelled this plea, and his Lordship's interlocutor was affirmed by the Inner House. The husband not having included these interlocutors in his appeal to this House, an application at the hearing to be allowed to do so was refused.

The appellant and respondent are husband and wife, and were married in Nov.'30. 1852. England in 1838. The respondent was by birth an Englishwoman, but the appellant was born in Scotland, and was the eldest son of a Scotch landed proprietor, on whose death in 1843 he succeeded to his estate. Immediately after the marriage the parties proceeded to Scotland, where, with the exception of various temporary visits to the respondent's mother in England, they resided until September 1845, when, on the occasion of one of these visits, the respondent withdrew herself from the appellant's society. The appellant thereupon instituted a suit in the Arches Court of Canterbury against his wife, for the restitution of conjugal rights, in defence to which she gave in an allegation, alleging, *inter alia*, cruelty and adultery on the part of her husband, and concluding as follows: "That she, the party proponent, may be separated from bed, board, and mutual cohabitation with the said John Edward Geils, by reason of his aforesaid adultery, and also by that of his aforesaid cruelty towards, and unnatural practices upon, the person of the party proponent, by your final sentence or definite decree, to be made, signed, given, and promulged in this behalf." Geils v. Geils.

The charge of adultery being established to the satisfaction of the Court of Arches, that Court, in April 1848, pronounced a sentence of separation *a mensa et thoro*. The respondent afterwards, in May 1849, raised in the Court of Session in Scotland the present action of divorce, by which, in respect of certain acts of adultery alleged to have been committed by the appellant, she concluded to have him divorced *a vinculo matrimonii*. In defence, the appellant pleaded, *inter alia*, as follows:—"1. The respondent being a native of England, and the marriage between the parties having been contracted and solemnized in England when she was domiciled there, according to the rites

Nov. 30. 1832. of the Church of England and the laws of that country, this Court has no jurisdiction to entertain the present action, and no power to dissolve the marriage.

"2. The respondent having instituted a suit against the defender in the Arches Court of England, founded on the acts of adultery libelled on in the present summons, and having in that process obtained, in April 1848, a regular sentence of separation *a mensa et thoro*, is barred from maintaining the present action in this Court."

The Lord Ordinary, (Wood,) in November 1849, repelled the first of these preliminary defences, and reserved the second until evidence of the nature of the proceedings in the Arches Court should have been produced, which interlocutor was affirmed by the First Division on 14th December 1849. After the cause returned to the Outer House, opinions of English counsel were put in as evidence of the nature of the proceedings in the Arches Court. The Lord Ordinary on considering these opinions, by an interlocutor of the 20th July 1850, *inter alia*, repelled the second preliminary defence, and the appellant having reclaimed to the First Division, their Lordships, on 14th December 1850, adhered. The present appeal was now brought against these two last-mentioned interlocutors, but not against the judgment pronounced on 14th December 1849.

Bethell, Q.C., and *Anderson*, Q.C., for the appellant, contended first, that this marriage being an English marriage, the Court of Session in Scotland had no jurisdiction in the matter, citing *Rex v. Lolley*, Russ. and Ry. 237; *Warrender v. Warrender*, 2 Clk. and Fin. 560; *Beazley v. Beazley*, 3 Hagg 639; and *Tovey v. Lindsay*, 1 Dow 118; but the Lord Chancellor said that they must argue on the assumption that the Court of Session had jurisdiction, as the interlocutor of that Court affirming the interlocutor of the Lord Ordinary repelling the defence of want of jurisdiction, had not been appealed from. It was then asked on behalf of the appellant, that he might be allowed to amend his appeal, by appealing from that interlocutor of the 14th December 1849, but *Moncreiff*, on behalf of the respondent, objecting to this course, the Lord Chancellor said that the appellant had better proceed to argue the appeal as it stood, and if the House should afterwards be of opinion that justice required the amendment to be made, probably the application to amend would be entertained. It was then contended on the part of the appellant, that the decree of divorce obtained by the respondent in England was a bar to the present action, that the subject-matter of adjudication in both Courts was the same, and that the respondent having already obtained from a competent tribunal the relief she sought, could not afterwards resort to the tribunal of another country for additional relief in respect of the same subject-matter of complaint. *Allison v. Cathy*, 1 D. B. M. 1025; 4 Ersk. c. 3, § 4, and *Story's Conflict*, 2d ed., p. 862. It was said that the respondent was substantially plaintiff in the Arches Court in a counter suit of divorce, the defence being in practice adopted as a substitution for a cross-suit, as shewn by *Best v. Best*, 1 Addam's Rep. 411, and that therefore the present case could not be distinguished from that of *Allison v. Cathy*. It was also argued that the judgments were irregularly and incompetently pronounced, without a record having been made up and closed in terms of the statute

6. Geo. IV. c. 120, sec. 4, 7, and 10. The Court of Session, it was said, had Nov. 30. 1852. dealt with the plea as a dilatory plea, and when the present appeal to this House was presented, the respondent petitioned against its being heard, on the ground of the judgment below being in respect of a dilatory defence, and there being no leave to appeal; but this House determined that it was a peremptory plea, and allowed the appeal to stand, (1 M'Queen's Rep. 36), therefore the Court below were wrong in not afterwards preparing and closing the record as on a peremptory plea. *Bell's Dict*, title "*Record*," 824. Geils v. Geils.

Moncreiff, and *Dr Addams*, contra, with reference to the last point stated, that the interlocutor of the Court below was not a judgment on the merits within the meaning of the statute, and although this House had held the plea as not properly a dilatory plea, yet it was in the nature of a plea to the jurisdiction of the Court, and it was competent to the Court to dispose of it without the record being closed, and in *Warrender v. Warrender*, the question as to jurisdiction was raised as here on the preliminary defences, and was afterwards brought before this House without the record being closed; on the same point *Hawkins v. Wedderburn*, 4 S. and D. 924; and *Gray v. Polhill*, 9 S. and D. 1146, were cited. With respect to the merits it was contended for the respondent, that the second plea was bad, because, in the first place, the remedy sought for in England by the respondent was not the same as she now asked for in Scotland, and in the next place, that she was not the institutor of the proceedings in the Arches Court, that the relief obtained by her there was not obtained at her primary instance, but that she was forced into that Court by the appellant, and that in defending herself, was obliged by the practice of the Court, to adopt the course she did, and though it was not necessary for her to have concluded her allegation with a prayer for divorce, yet that it was almost the invariable practice to do so, and whether so prayed or not the sentence of divorce would still have followed. *Connelly v. Connelly*, 7 Notes of cases in Eccl. Courts, 444; *Westmeath v. Westmeath*, before the Privy Council, not reported, and as to the marriage being a Scotch marriage, *Warrender v. Warrender*, 2 Shaw and M'Lean, 154, was relied on.

Bethell, Q.C., replied.

The LORD CHANCELLOR. My Lords, the case is one of a marriage by a person who was a Scotchman domiciled in Scotland, with an English lady of landed property in this country. [His Lordship, after detailing the principal facts, said,] My Lords, it appears that the nature of the defence in England must have been that which this lady set up to the suit for the restitution of conjugal rights. She had not a variety of defences, but a single defence, and that was the case of adultery. The consequence of the adultery being proved would of course be, that the husband would not succeed in his suit. But it appears clearly enough from the case of *Best v. Best*, that formerly a cross suit was necessary by the wife, if she desired her defence to be followed up by a decree in her own favour, divorcing her husband and herself *a mensa et thoro*. That form, however, has long since been deemed unnecessary, and very properly so. The result is, that there is no case, I believe, to be found in which

Nov. 30. 1852. a wife has rested simply upon her defence, and has not coupled that defence with a prayer for a divorce from bed and board.

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Now, if your Lordships will consider for a moment, you will see that it could not in the nature of things be otherwise. We are now speaking of matters of substance and not of form. If she were to rest simply upon the defensive, and then the husband's process were dismissed, the right would remain in the husband, although the remedy might be imperfect, but she would have no decree absolving her from her liability as a wife to consort with her husband, and give him all the privileges and rights of a husband. It is of necessity therefore that the defence upon this ground should be coupled with that which so naturally and necessarily follows from it, viz., the right to continue in the situation in which she is found at the moment that the proceedings were instituted, living as a wife apart from her husband, and insisting upon her right to continue to do so. The question remains to be considered, What is the consequence of having that relief of a sentence of divorce? But I must here, before I proceed further, draw your Lordships' attention to the nature of the case as regards the jurisdiction of the Courts in Scotland.

It is said that the divorce here got rid of the husband's domicile. But supposing that to be so, upon which I would rather not give any opinion, yet that would not create any difficulty in this case as to the jurisdiction of the Scotch Courts, because, supposing in other respects the proceeding which the wife instituted there to be right according to the law of Scotland, the husband being domiciled in Scotland and being a Scotchman, the crime itself having been committed in Scotland, there can be no question that the lady was entitled, as far as jurisdiction goes, to take her remedy against the husband. As far, therefore, as depends upon the simple question of jurisdiction, I think the case is free from all possibility of doubt. What the effect of the proceeding is, is another question.

Against the proceeding instituted by the wife for a divorce *a vinculo matrimonii*, the husband pleaded first of all, want of jurisdiction. The Lord Ordinary repelled that defence as far back as November 1849. That interlocutor was affirmed by the First Division of the Court in December 1849, and there appears to have been no appeal from that interlocutor.

Now, it was said at your Lordships' bar, as I understood, that not appealing against that interlocutor was an over-sight, and that the great foundation of the appellant's argument must rest upon the fact of the want of jurisdiction, and that it was open to your Lordships, and that you would think it right to allow the appellant to appeal from that interlocutor, and I ventured to state on the part of your Lordships, that if it were found that it was a slip, and it was material, probably your Lordships might be induced, if a strong case were made out, to give the appellant that liberty. But, my Lords, it is quite clear that the parties were perfectly well advised in not appealing from that interlocutor. The point was so clearly settled beyond the possibility of doubt in *Warrender's* case in this House, that it would have been hopeless to have attempted to establish the point which was overruled by that interlocutor, and therefore, it was not on account of any slip, but evidently on mature advice and consideration that the appellant did not appeal from that interlocutor. [His Lordship here commented at length on Sir George Warren-

der's case.] Now, my Lords, the result of that case clearly proves that it was not intended to appeal against this interlocutor, and yet in point of fact, both in the argument at your Lordships' bar, and in the printed papers, you will find that they still rest their case upon the want of jurisdiction. And Mr Bethel, who argued this case for the appellant, fairly stated that it was exceedingly difficult to maintain his argument without referring constantly to the question of jurisdiction, and relying upon want of jurisdiction in this case. Now, my Lords, there is this very material difference to be considered between the law of Scotland and the law of England. By the law of Scotland you may obtain a decree for separate maintenance, or a decree for separation, according as circumstances may be proved, that is in effect, you may obtain a decree *a mensa et thoro*. Or you may also obtain in Scotland from the Courts there, what you cannot obtain here,—that is, you may obtain a divorce *a vinculo matrimonii*. Here you can do no such thing. It is necessary by our law to resort to Parliament in order to obtain that latter relief. And here that very relief cannot be obtained, speaking generally, (there may be exceptions to that,) unless the husband has obtained a divorce *a mensa et thoro* in the Ecclesiastical Court before he comes to this House for that relief. What is done by Parliament is considered to be in aid and furtherance of that relief which has been obtained in the Court below. In the Courts in Scotland no such remedy is to be had, and no such remedy is necessary, because the Courts there can either, as a second step or as a first step, altogether dissolve the marriage.

My Lords, there is one other distinction to which I must call your Lordships' attention, which is, that in England, speaking generally, a woman cannot obtain a divorce as a man can. In Scotland, the woman's rights, and the man's rights are equal. The point of law now before your Lordships depends upon the second plea. [His Lordship here read that plea.] Now, in my view, in the first place I should say this plea is founded upon a false allegation. I do not admit that the pursuer in this case did institute a suit against the defender in the Arches Court in England. The husband instituted a suit. The wife took a defence, which, by the forms of the Court amounted to a counter process no doubt, and as she had to prove her case, she became an actor beyond all question. But that does not justify the statement in this plea, that she instituted a suit against the defender. They say, the lady is an actor. To be sure she is. Suppose in any personal attack, one man strikes another. The man who was first struck, knocks the other down. No doubt he is an actor, but is not that action a defence? Why did he knock the other man down? Simply because he had been assaulted; it was in defence, and therefore to say that such a man is an actor, is saying nothing, for it is necessary to his defence that he should assume the part of an aggressor, but it is simply a defence, for he did not begin the attack. Nobody can say that it was the beginning of the attack, any more than you can say here, in my apprehension, that this was the institution of a suit by the wife. My Lords, the objection which is taken partly in the pleadings, and partly at your Lordships' bar, assumes this shape: Independently of the question which I shall presently consider more at large, namely, the effect of this divorce *a mensa et thoro*, it is objected upon the pleadings, and also in argument at your Lordships' bar, that if there had

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Nov. 30. 1852. been no proceeding by the wife, as they call it in the Arches Court in this country, still she could not have sued in Scotland as the law stands there.

Geils v. Geils. Now, as I understand that point which was partly argued, though not so much at large as it is stated in the papers, it depends upon two or three authorities. One of them is the case of *M'Carthy v. De Caix*, 2 Clk. and Fin. 568, and 2 Russ. and Myl. 614; which was before Lord Brougham in the Court of Chancery, in which I was counsel, and the other case is *Lolley's case*, Russ. and Ryan's C. C. 237; which was also in this country. In *M'Carthy v. De Caix*, the question arose between the representatives, after the death of the wife, upon the right to certain property which had belonged to her, and that involved the question whether the marriage had or had not been properly dissolved by the authorities in Denmark. That depended upon this. The husband was a domiciled Dane. He married an English lady. They went to Denmark, and the husband there obtained an absolute divorce, dissolving the marriage. And upon certain letters which had been written, the question arose, whether he had or had not waived the right, which as husband, he might have had to a certain portion of the wife's property. I stated that I was counsel in the case, only for this reason, and I think my recollection enables me to say, that the question of the effect of the divorce was not argued in that case, and I see no trace of it in the report. On the contrary, the inference is the other way, and my strong impression is, that that point was not argued in that case, but the Lord Chancellor took up that point, and upon *Lolley's case*, he held that an English marriage could not be dissolved by a Danish Court, that our law could not recognise such a dissolution. Now, *Lolley's case* was of this nature. An Englishman and an Englishwoman were married in England. The man married twice in England. The first wife being alive, he was tried for bigamy. His excuse was, that the first wife had committed adultery in England, and that he had obtained a divorce in Scotland. All the Judges were of opinion that the marriage was not dissolved by the law of England. He was convicted of bigamy, sentenced, and punished by imprisonment for a very considerable period, and afterwards pardoned. That has been considered, no doubt, a solemn decision by the Judges of England, upon the effect of such a divorce. But in the first place, it does not touch this case because that was a case of English subjects with an English domicile, the crime being committed in England, with a residence of above forty days by the husband in Scotland. It was an undefended cause on the part of the wife, I believe, but whether that was so or not, the whole object there really was to evade the laws of England; and I think that is proved pretty clearly by this fact, that the husband seems to have married again in England, as I collect from the dates, almost immediately after the dissolution of the marriage in Scotland. Now, taking that to be so, I am not here to advise your Lordships to dispute that law, nor to enter into it, but what does it lead to? It leads to that which we know does exist, namely, an actual conflict between the laws of Scotland and of England. That is very much to be deprecated; What then? We have, my Lords, no power to decide in a Scotch case against the laws of Scotland, merely because there is a conflict with the law of England. Scotland has a right to her laws, and to have them administered according to the laws of Scotland, just as much as England would

claim to have her rights established according to the law of England. I will shew to your Lordships what was the opinion of the noble and learned Lord who decided the case of *M'Carthy v. De Caix*, and who relied so much upon *Lolley's* case, when the same argument was pressed upon him in *Warrender's* case. [His Lordship here read Lord Brougham's judgment, from 2 Cl. and Fin. 567.] Whatever opinion my noble and learned friend may have entertained as to the law established by those cases, he was clearly of opinion, in which I entirely concur with him, that it could not be made the ground of an objection, sitting in appeal, as we are now, upon cases from Scotland. I shall therefore dismiss those cases altogether from my consideration, and I shall assume, as I am entitled to do, that the jurisdiction in this case was perfect, and that the only question is, Has the wife lost her right to go to the Courts of Scotland for further relief, in consequence of the relief which she has obtained in the Courts of this country? My Lords, the principal case which was relied upon in support of that doctrine, (indeed it is, I may say, the only case), was the case of *Allison v. Cathey*. [His Lordship here commented at considerable length on that case, and afterwards referred to the opinions of the Judges of the Court of Session, delivered in the case under appeal with reference to *Allison v. Cathey*.] My Lords, it was said by Lord Fullerton, upon whose opinion this appeal very much rests, that the wife was an Englishwoman, and that her course was therefore this, "she would at once have declined the jurisdiction, or at all events have instantly raised her action in this country, (Scotland), and pleaded that action in defence against the English suit." "I am far," said his Lordship, "from saying that that objection would have been successful." Now, my Lords, I apprehend it clearly would not have been successful. The Court in this country never would have stopped its own proceeding, because proceedings had been raised in a foreign country, by an adverse party. But it was said in argument at your Lordships' bar, following that up in a great measure, that the wife should have gone to Scotland, as I took it, concurrently with the suit here, and then the suit here would have been suspended. That is in effect the same thing, though no authority is cited for that. Such a proceeding as that would at once have produced a real conflict. The Courts of the two countries would be in opposition to each other, but I do not apprehend that the Courts of this country would have stopped a suit here in order to see what might be the result of a suit in Scotland. I think we may safely assume, particularly from the statements of Lord Cuninghame in the Court below, that it is the law of Scotland, that the wife might first obtain in Scotland a divorce *a mensa et thoro*, and then afterwards maintain another suit for a divorce *a vinculo matrimonii*. Now, my Lords, if that be so, we then come to a very important question about the analogy between the law here, and the law in Scotland. Now my Lords, let us consider for a moment how the matter stands as regards the law of England and the law of Scotland. No man can dispute that this lady, by the law of Scotland, with which the law of England could not interfere, might have resorted to Scotland in the first instance, and have obtained a decree of divorce *a vinculo matrimonii*. That is beyond all question. It is equally clear, I think, that she might have gone to Scotland and have obtained, in the first instance, the lesser remedy of a divorce *a mensa et*

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Nov. 30. 1852. *thoro*, and afterwards have maintained a suit for an absolute dissolution of the tie of marriage. If so, can the act of the husband take away from the wife the right which she has to the remedies to which I have referred. If it cannot, the question simply is, what is the effect of the act which she herself has committed in the suit instituted in this country? She was dragged into Court. She was compelled to go. Supposing she had taken the advice, which was not offered to her at the time, but which Lord Fullerton gave to her at a later period, and supposing she had acted upon that advice, there would have been a decree against her in her absence, and she would have been subject, in this country, to have had that decree enforced against her for the restitution of conjugal rights which she had refused. Can it be asserted then, that because she has taken the remedy which she is entitled to in the suit, instituted, not by her but by the husband, because she has taken the only defence that was open to her, (whether she was entitled to ask for a divorce, *a mensa et thoro*, I do not trouble myself at this moment with considering,) the only defence which was open to her was that of cruelty and adultery; upon that defence, by the course of the Court, she is entitled to the relief she obtained; can it be insisted, that because she took that which the Court tendered to her, she is therefore to be estopped from resorting to a higher remedy, to which she was entitled before the suit was instituted, and which she has done no act to deprive herself of the benefit of? If we look to the operation of the law of England, and the law of Scotland, we shall find that by upholding this decision, we put them perfectly upon the same footing. The law of England differs from that of Scotland as to the right of the wife being co-equal with the right of the husband, but in other respects, it stands precisely, as it appears to me, upon a similar footing, with this difference only, a difference which the law of each country itself introduces, namely, that in England you must have a divorce by Parliament in order to dissolve the tie, and in Scotland, the Court itself can untie the knot. But in England, as I before stated, when the husband is asking for a divorce for the exercise of the highest power which this country can exercise, so far from its being considered an objection that he has already obtained a divorce *a mensa et thoro*, unless he obtains that divorce in the first instance, he is not entitled to the higher remedy. The administration of the laws of the two countries is different, but is there any difference in degree? The wife has a right to dissolve the marriage altogether. She has not lost that right, and I think, therefore, as far as these points go, I ought to recommend to your Lordships to affirm the decision of the Court below, which is complained of.

My Lords, I have not hitherto mentioned one point which was raised, and I may say pleaded. It was insisted that the record was not properly closed upon the pleadings, and that therefore the case should be remitted. It does not appear to me that that objection can be maintained. Whatever be the nature of the plea, it is a plea in bar of the action. The real contest was in regard to the jurisdiction and the domicile. That was disposed of by the first plea, and then the parties took the second plea as a plea in bar of the proceedings. My own impression is, (I understand, however, that my noble and learned friend entertains a different view upon that point,) that it is not a case which falls within the provisions of the Act of

Parliament. That might have raised a more difficult question, but I apprehend that the question does not arise in this case. Therefore I am not disposed to agree in thinking that it is necessary to remit this case. Upon the whole, therefore, my Lords, I propose to move that the interlocutors appealed against be affirmed. Nov. 30. 1852.
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LORD TRURO. My Lords, the first point upon which I would address your Lordships is the application to amend. The object of that amendment was to bring before your Lordships the question which I think was solemnly decided in *Warrender v. Warrender*. I agree that it would be scarcely possible to consider that the main point in which the parties were interested, namely, the available authority of the Courts in Scotland to annul the marriage in question, could have escaped their attention when they appealed to this House. I must therefore come to the conclusion that the application to amend, is in truth the result of subsequent consideration, which I think the House ought not to yield to, unless it could be shewn that these questions which are legitimately before the House, cannot be properly argued before the House and the House put in possession of the proper materials for forming a judgment upon them without bringing under your Lordships' consideration that interlocutor which is not appealed from. But inasmuch as the parties are in a condition to receive the judgment of this House upon the points which they have deliberately raised upon the record, it does not appear to me that justice at all requires that the amendment which has been asked for should be granted. My Lords, the second point is the one to which my noble and learned friend last alluded. It is objected that this record has not been properly closed, and I own I have considerable difficulty upon that subject. My Lords, by the 6th of George the IV, c. 120, and by the rules and regulations of the Courts below, it is required that before any judgment is given upon the merits involved in a case, the parties shall be called before the Judges and asked whether the record is in a state which they deem perfect and sufficient in order properly to raise the questions before the Court for judgment, a most prudent and advisable course, and one which I think might very advantageously be imported into England, as it prevents surprise afterwards. My Lords, the question which has been discussed, and which has become a material incident in the decision of this case, is, what is the effect of the proceedings in the English Consistorial Court? It has been correctly said that it was foreign law to the Court in Scotland. My Lords, according to my humble apprehension, a very erroneous view is taken of the effect of these proceedings. I do not think that the error ought in any degree to affect your Lordships' judgment, but certainly it would be more satisfactory if it were otherwise. It is said, that according to the course of practice and of law in the Ecclesiastical Court in England, a husband or wife, who, by a responsive allegation in a suit, charges adultery, and prays a remedy upon that charge, is not the institutor and originator of the suit. My Lords, I am satisfied myself that upon a full and correct investigation of that question, that opinion would turn out to be utterly erroneous, and that in every view in point of law the allegation that the lady instituted the suit is correct. The process of every Court has but one object, which is, to bring the party before the Court to answer the matter which is to be produced against him. The complaint is to be found in the

Nov. 30. 1852. libel. If a party is engaged in a suit before a Court with a certain individual, there wants no allegation to bring that party before the Court; he is there.

Geila v. Geila. It is impossible, as it appears to me, to attend to the judgment of the Court below in this case, or I think, even to go through the cases which are cited in *Best v. Best*, without coming to the conclusion, that if the wife or the husband advances in a responsive allegation matter which may be made the foundation of a decree, that libel is in the nature of a declaration in a new course. What said Sir Herbert Jenner Fust in this very case? Why, he said, originally a suit was commenced by the husband for the restitution of conjugal rights, but the wife by a responsive allegation has now charged her husband with adultery, and the cause is changed, and the shape it now assumes is that of a cause of separation brought by the wife. I think if the wife had instituted a suit, the effect ought to have been the same in this case, as my noble and learned friend has cited authorities to shew it would have been in the Courts of Scotland; I would say, my Lords, that it is extremely material that a correct view should be taken of these proceedings. But unfortunately by not closing the record, but doing that which by the law of the country ought not to have been done, viz., giving judgment on a matter of merits without the record being closed, or before it was closed, I think the Court below and the House are left without some of those materials which otherwise they would have possessed, and I think it is owing to that omission, that what strikes me as being an entirely erroneous view of the effect of the proceeding in the Consistorial Court, has been arrived at. My Lords, whether or not the parties would now derive any advantage from this case being remitted, by reason of the record having been so closed, is another question. This is not a technical defect, it arose from this circumstance, I say it with all respect to the learned Judges in Scotland, (but I say it under the authority of this House), that a mistake was made in considering this second plea as a dilatory defence. By the law and practice of the Courts, they are called on to decide upon the validity of a dilatory defence without the record being closed, and therefore they held this to be a dilatory defence. The parties therefore could make no appeal. When it came to this House upon an appeal for the purpose of getting rid of that judgment, a petition was presented that the appeal might be dismissed, upon the ground that it was a dilatory defence, and therefore that an appeal was not competent without leave of the Court. The appeal committee of this House thought that too grave a question to be decided there without the assistance of learned counsel, and they therefore directed that it should be argued at your Lordships' bar. The question was solemnly argued at your Lordships' bar whether this was a dilatory defence or a defence upon the merits, and the House determined that it was a defence which might be called a defence upon the merits; that is to say, that the party had no remedy at all, and that it therefore went entirely in bar of the proceeding. Therefore the appeal was allowed to stand in your Lordships' paper, and has been argued.

But, my Lords, supposing the House to agree in that which I humbly conceive is the correct view of the proceedings in Doctors Commons, namely, that in every legal point of view, and according to the practice of the Court, and upon principle, this lady was as much the originator of a suit, and as much

as a plaintiff in a suit, as if her proceeding had been the only one, I think that Nov. 80. 1852. the House would arrive at precisely the same conclusion as it has now come to. Regarding it as a matter of discretion, I think it would not be the exercise of a wholesome discretion on the part of your Lordships, to grant the amendment which is asked for. I am not prepared to say that it is a matter of right, but it strikes me that if it is a matter of right, inasmuch as the amendment is a proceeding which tends to delay and expense, the application should at all events have been made at the earliest practicable opportunity. I think, before the House was called upon to decide upon the validity of the decree—before so much time was occupied, and so much learning thrown away—the application should have been forthwith made, when, if this House had held it to be a substantial defence to the merits, the case could have been remitted at once. My Lords, I am therefore very much disposed to concur in the conclusion at which my noble and learned friend has arrived. I own, I think it an important matter, and I am not without considerable doubt whether this conclusion is strictly correct, but I am satisfied it answers the justice of the case. Every case before your Lordships is of quite as much importance as a precedent as in respect of the decision in the particular case; and I think that this case may hereafter be considered as an authority, that where parties are arguing questions without the record being closed according to law, this House will take into consideration, how far, in each particular case, the party has been prejudiced by a departure from that rule, which I consider ought to be inflexible, and which I regard as a very useful rule. Geils v. Geils.

My Lords, I will now pass from this point to the main question in the cause. The question is, is the defence contained in the pleas which have been brought under your Lordships' consideration, a sufficient answer, in point of law, to the libel of this lady, in which she prays for a divorce *a vinculo matrimonii*? My Lords, it will be necessary to consider what is the nature of this plea. Is it a plea by way of estoppel? It seems to me to partake more of the nature of a plea of judgment recovered, than of any other plea. Now, my Lords, I am not aware precisely to what extent the law of estoppel prevails in Scotland; but all that I have been enabled to discover on the subject leads me to the conclusion that the principle prevails there as it does here, with very little difference. Every estoppel must be precise and distinct, and to the same point. This is an application in Scotland for a divorce *a vinculo matrimonii*. What has been done by this lady which is inconsistent with her prayer for a divorce, so as to put the case upon the ground of estoppel, and to enable the husband to say, you, by your conduct, have said and done that which is inconsistent with the remedy which you are now pursuing? The plea is more in the nature of a plea of judgment recovered. This, I apprehend, would be found pretty much to be the law of every country, that where a man has once sought redress for a particular injury, he is not entitled to split his complaint, and, in respect of the same subject-matter of complaint, to ask for one species of redress which shall be applicable to the whole subject-matter of his complaint in one Court, or at one time, and a different species of redress for identically the same wrong or matter of complaint at another time. In this case I will suppose that this lady, independently of any suit

Nov. 30. 1852. on the part of the husband for restitution of conjugal rights, had commenced a suit for a divorce *a mensa et thoro*, in England. Consider what her situation is. She is in a country where marriages are indissoluble; she is in England, where she has no means, by any legal mode (although an Act of Parliament may be granted, but I should throw that out of our consideration), of protecting herself from her husband forcing her to cohabit with him. She resorts to the law for that purpose. She states her wrong, and she prays the protection of the law, and accordingly a divorce *a mensa et thoro*, is pronounced until the parties shall be reconciled. She has come into a Court, not to ask partial relief—she has not come to divide her complaint, and to endeavour to recover by instalments the redress which she desires. She states her whole complaint, and she asks all the relief which it is in the power of the Court to give. She goes to Scotland, and we are dealing with a case in which the Scotch Courts have jurisdiction. She there prays for a divorce *a vinculo matrimonii*. What authority has been cited to shew that the remedy which she has obtained in the Court of Doctors Commons is a bar to that proceeding? I am not aware that any such authority has been cited except the case of *Alison v. Cathey*, which I will deal with presently. You cannot do that, which, in the case of *Lord Bagot v. Williams*, 3 B. and C., 235, was attempted to be done. You cannot go to a Court with an entire demand, and in that Court limit that demand below its real amount and recover, and then go to some other Court and recover the remainder. But this is not such a case. Here the ground upon which I think, in concurrence with my noble and learned friend, that this is no bar, is, that the remedies are collateral; they are directed to distinct objects, and have totally different effects; and therefore, the circumstance of this lady pursuing a remedy for the purpose of obtaining protection against being compelled to cohabit with her husband, either during a given time, or an indefinite time, is quite consistent with the proceedings which she afterwards instituted, ultimately to annul the marriage.

My Lords, considering the great importance of this case, I have searched very widely, and in fact made use of all the materials that were within my reach, for the purpose of seeing if I could discover any principle either in the Scotch law or in the English law which it appeared to me this House ought to adopt as applicable to this case; but I cannot find any which would go to shew that pursuing a collateral remedy of this description is any bar to the pursuit, either in the same Court or in another Court, of a further remedy. The two things may well stand together, and I think that disposes of the only, or the principal difficulty arising out of the case of *Alison v. Cathey*. A great many remarks are introduced into that case, but what is the decision that was come to? The case was decided upon the ground of jurisdiction. The Court had nothing to do with what was the effect of the English divorce. It is said the man's residence in Scotland was only colourable. I am not aware that there is such a thing as colourable residence. When the law says that a man's residence in a country for a certain space of time shall place him in a certain position, I do not understand how the mode in which he resides there can have any operation in qualifying the effect of the residence. If a man resides forty days in Scotland he is sufficiently domiciled there to subject him to all the Courts of Scotland, and to entitle him equally to all the benefits of

the Courts of Scotland. But if it was meant to say he had not a sufficient residence to give jurisdiction to the Scotch Courts, that was a solid ground for disposing of his complaint. The effect of the judgment in that case is, that a man, no matter whether he be an Englishman or a Scotchman, who sues in England and gets a divorce *a mensa et thoro*, is barred from maintaining a suit for a divorce *a vinculo matrimonii* in Scotland. That is the judgment. My Lords, six of the Scotch Judges have said distinctly, that a judgment of divorce *a mensa et thoro*, is a bar in Scotland to a suit for a divorce *a vinculo matrimonii*. I think in this case the learned Judges' judgment below proceeds mainly upon the point that this lady was not the originator of the suit. They say she was defending herself. Yes, so she was, but she was doing more. You have not closed the record; you have not given the parties an opportunity therefore of presenting the case in its fulness to you. She might have been dismissed from that suit, and have reserved her remedy for Scotland, if she had taken the defence she took, without adding the prayer, which is contained in her defence, namely, a prayer for affirmative relief. The learned Judges in this case have said the contrary of that which is distinctly decided in *Allison v. Cathey*. They have said that a judgment of divorce in the Courts in England, which is founded upon a responsive allegation by the wife, is no bar to the proceedings for a divorce in Scotland, because it is said the wife is not the originator of the suit, and is not an actor in it, inasmuch as her charge of adultery is raised merely by way of defence. I think your Lordships must not shrink from taking the correct view of *Allison v. Cathey*, and that you must not let that case be set up hereafter, unless your Lordships think it contains good law, by reason of its being supposed to be founded upon some circumstances which may delude parties to appeal; those circumstances being, in fact, so different, as to give rise to important distinctions. I therefore, my Lords, concur in the opinion that this plea is a bad plea—that the fact it alleges does not prevent the party obtaining that relief which she is well entitled to. I therefore concur in the judgment which my noble and learned friend has recommended your Lordships to pronounce in this case, being satisfied that, as a matter of right, the appellant is not entitled to have this cause remitted, by reason of a judgment having been given on the merits, contrary to the law of the Court, without the record being closed.

Dr Addams applied for the costs of the argument as to the competency of the appeal, which had been reserved by the House, for which he cited *Gray v. Forbes*.

Anderson opposed the application, and cited *Keith v. Keith*, 1st Bell's New Cases, 426.

LORD CHANCELLOR. My Lords, in this case I think it is quite clear that there ought to be no costs on either side.

Interlocutors affirmed without costs.

<i>Smedley & Rogers,</i>	}	Agents for the Appellant.
<i>Dodds & Greig,</i>		
<i>A. & C. Douglas, W.S.,</i>		
<i>Grahame, Weems, & Grahame,</i>	}	Agents for the Respondent.
<i>Lothians & Findlay, S.S.C.,</i>		

No. 4.

The NORTH BRITISH BANK v. COLLINS.

Partnership—Obligation—Fraud—Process—Relevancy.—By the contract of a Banking Company, it was provided, that the business of the Company should be exclusively limited to banking in all its branches; that the management should lie in directors, who were bound not to disclose the transactions of the Bank; that reports and balance-sheets should be submitted by the directors to the shareholders at an annual meeting; that none of the shareholders should have access to the books of the Bank, but a majority might, at the annual meeting, appoint auditors to examine and report upon the balance-sheets; and, that, "if it should at any time be found, on balancing the Company's books," that losses had been sustained to a specified amount, "such loss should, *ipso facto*, put an end to and dissolve the Company."

In an action at the instance of a shareholder, libelling gross fraud and irregularities on the part of the directors, and averring that losses to the amount specified in the contract had been sustained, and concluding for declarator that the Company was dissolved :—

Held, 1st, That the provisions of the contract of copartnery implied, and were only applicable to, the case of fair and ordinary management on the part of the directors, and did not bar a shareholder from insisting in an action like the present, in which fraud on their part was distinctly and relevantly libelled.

2d, That the provision of the contract relative to the dissolution of the Company, in the event of losses to the amount specified, might be enforced, if it were shewn that at any time in the course of the year losses to that amount had been incurred, and was not to be construed as taking effect only if these losses appeared in the balance-sheet submitted by the directors to the annual meeting.

3d, Circumstances in which, and averments under which, *held*, That fraud on the part of the directors was relevantly libelled, and, *ante omnia*, a remit made to an accountant to examine the books of the Bank and report, 1st, whether the books of the Bank were correct, and, if erroneous, to what extent, and in what manner? 2d, Whether it appeared from the books, or could be correctly ascertained, that losses had been sustained by the Company equal to the specified sum, and if so, what was the amount of the excess?

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The North British Bank was established in Glasgow in the year 1845, on the footing of a joint stock company, regulated by a special contract of co-partnership. By the 39th article of the contract, the directors are at each annual general meeting to exhibit a statement or abstract of the preceding yearly balance-sheet, and such further statement or report of the affairs of the Company as they may deem it expedient for the interests of the Company to be made public, and every such statement, or abstract and report, is to be binding and conclusive on all the partners and their foresaids, unless some error shall be discovered therein before the next subsequent statement or abstract shall have been produced, and in that case such error shall be rectified, and this always without prejudice to the provisions contained as to the appointment and powers of auditors.

By article 52, regular books are to be kept, to be balanced on 31st December every year, and a statement or abstract of the balance is to be laid by the directors before the annual general meeting in February; "And it is hereby provided and declared, that the partners, other than the said ordinary directors, shall, on no account or pretence, have right to see or examine the books of the Company, but shall be bound to rest satisfied with the yearly statements or abstracts above provided for. But farther declaring, that it shall be competent to a majority of the partners, or proxies of partners, reckoned as aforesaid, present at the said general meeting, to be held on the second Wednesday of February 1847, or at any subsequent annual general meeting, to

appoint, if they see cause, two partners qualified to be directors, as auditors, to Dec. 8. 1852. examine and report upon the said statements or abstracts, and also upon the state of the accounts and affairs of the Company generally, which auditors, ^{N. Brit. Bank} after binding themselves to secrecy in the same manner as the ordinary directors, shall have full and free access to all the books, vouchers, writings, and other documents connected with the affairs of the Company; and also power to call in the aid of the managing director, cashier, secretary, accountant, officers, clerks, and servants of the Company, or any other person who may be deemed competent by the auditors to give information; and in the event of the appointment of such auditors, any general meeting at which they shall be appointed may be adjourned to some future day or days, to receive their report, and dispose thereof." ^{v. Collins.}

And by article 54 of the said contract, it was "expressly provided and declared, that, if it shall at any time be found, on balancing the Company's books, that losses have been sustained equal to the whole of the reserved surplus fund, and also to £25 per centum on the advanced capital stock of the Company, such loss shall, *ipso facto*, and without the necessity of any further procedure, dissolve and put an end to the Company;" in which event, it was further declared, "the dissolution shall be forthwith notified by the ordinary directors by advertisement and circular letters, in like manner as is provided with regard to special general meetings of the Company, as well as in the London and Edinburgh Gazettes, which advertisements in the Gazettes and newspapers shall be continued once a-week for at least one calendar month succeeding the dissolution; and, within thirty days at farthest after such dissolution, the Company shall discontinue the issuing of notes, operations on cash-accounts, and all ordinary business."

The respondent, who is a partner and holder of shares of the stock of the Company, raised an action of declarator against the appellants and others, consisting of the directors and shareholders of the Bank. The summons averred, *inter alia*, that the respondent was ready to prove that certain statements or abstracts of the Company's affairs which had been exhibited "to the shareholders at two annual general meetings, were grossly unfair and deceptive; that the affairs of the Company were in a ruinous condition, and that the losses which the Company had sustained at, and prior to, the 31st December 1847, greatly exceeded the reserved surplus fund, and £25 per cent. of the capital stock; that the directors had been guilty of gross malversation and fraud in their management of the Company's funds and affairs, and that matters were in such a condition as to render it absolutely necessary, with a view to avoid farther loss, that measures should be taken to save a portion of the Company's stock, and to protect the partners against liabilities to third parties, which might extend greatly beyond the amount of the capital stock." The summons also averred, that the directors, instead of confining themselves to the business of bankers as provided by the contract, had engaged in numerous and extensive speculative and trading adventures, some of which were set forth in the summons, and that by such transactions the Company's funds had been employed, and a considerable part of the capital stock of the Company had been lost. The summons alleged also, that the directors had "been guilty of gross malversation and fraud, with a view to their own profit, and to

Dec. 3. 1852. *N. Brit. Bank v. Collins.* the loss and injury of the Company," and, in particular, stated a transaction in which, it was asserted, that the directors had caused false entries in the books to be made with reference to an appropriation among themselves of 2,400 shares. It then stated the following:—"That the purpose for which the Company was formed has entirely failed, and cannot now be attained; and no proceedings are or can be carried on by, or in name of, the Company, except what are at utter variance with the intention and agreement of the parties forming the same, and with the terms, meaning, and spirit of the contract of copartnery; and any further prosecution of such proceedings will be attended with the imminent risk of entire ruin to the pursuer and other shareholders of the Company, whose liability to third parties is, under the contract, unlimited; for which reasons, as well as because the loss upon the Company's stock greatly exceeds the amount which it was declared by the contract should operate, *ipso facto*, as a dissolution of the Company, it is proper and necessary that the Company should be declared dissolved, and its affairs be wound up:" and the summons concluded to have it declared, that at, and previous to the 31st December 1848, and 14th February 1849, the dates of the two last annual general meetings of the Company, losses had been sustained equal to the whole reserved surplus fund and the £25 per cent. upon the advanced capital stock, so that in the terms of their contract, the Company upon the 14th February 1849 became, *ipso facto*, dissolved and put an end to; or otherwise, that it should be declared that in respect the purpose for which the Company was formed had entirely failed, and that the business doing or which might be done by the Company was not such as was contemplated by the said contract, and in respect of the gross malversation in conducting the affairs of the Company, as aforesaid, and the imminent risk of ruin attending the further prosecution of the proceedings, the Company should be dissolved and brought an end to.

Defences were given in against this action, containing the following pleas:—

1. The summons is irrelevant. The narrative and subsumptions do not warrant or infer the conclusions.

2. The present action is excluded by the terms of the contract of copartnery, to which the pursuer was a party, and by which he is bound.

3. There are no sufficient grounds for declaring that the Company has been, *ipso facto*, dissolved, or which can entitle the pursuer to have it now declared dissolved, and ordained to be wound up, as concluded for in the summons.

4. The action is, in the whole circumstances, groundless on its merits, and the defenders will be entitled to absolvitor, with expenses.

A record having been made up, the Lord Ordinary (Robertson,) on the 9th Nov. 1850, pronounced the following interlocutor:—"Before answer, and before further procedure, remits to Mr Donald Lindsay, accountant in Edinburgh, to examine the books of the Bank, and reports of the Directors, at and previous to February 1849, and relative vouchers and documents, and to report to the Lord Ordinary—1st, Whether the said reports of the Directors, and the balancing of the books therein referred to, are true and correct, or, if erroneous, to what extent, and in what manner: 2d, Whether it appears, from the said books, or can be correctly ascertained, that, at or prior to the 31st December 1848, losses had been sustained by the Company equal to the whole of the re-

served surplus fund, and also to £25 *per centum* on the advanced capital stock Dec. 3. 1852. of the company, and if the said losses exceeded the said surplus fund and percentage on the capital, what was the amount of the said excess—said report to N. Brit. Bank. v. Collina.
be lodged *quam primum*.

The appellants reclaimed against this interlocutor to the First Division of the Court, when their Lordships pronounced the following interlocutor: '*December 1850.*—The Lords having advised the reclaiming note, . . . and heard parties fully on the question of relevancy, adhere to the Lord Ordinary's interlocutor submitted to review, with this variation, that instead of the words "before answer," the words "*ante omnia*" are to be inserted, reserving all questions of expenses."

From these interlocutors the present appeal was brought.

Bethel, Q.C., and *Anderson*, Q.C., for the appellants. The Lord Ordinary was wrong in disregarding the pleas which were a bar to the action, and the order which he made was premature and in contravention of the Judicature Act 6 Geo. IV. c. 120, pp. 13 and 16. The inquiry could not be made until the relevancy of this record had been disposed of, and the Court had therefore no power at all to make the order of reference. There is nothing made out or alleged in the pleadings which is sufficient to support the summons in this action; there is no sufficient allegation of loss down to the time of action to bring it within the 54th clause of the contract: the balancing spoken of in that clause means the periodical balancing and statements referred to in the 39th and 52d articles, and the course for the respondents to have taken, if dissatisfied with such accounts, was to have called a general meeting of the shareholders, or got the accounts referred to auditors, pursuant to the 52d clause, *Foss v. Hardbottle*, (2 Hare, 461) shows that if the subject of complaint is one which is capable of being entertained by the shareholders, and can be brought within the powers of a general meeting, a Court of Equity in England will not deem it expedient to interfere until the plaintiff has exhausted such mode, or been prevented from doing so. The case of *ex parte Holme in re the North of England Joint Stock Banking Company*, 16 Jurist, 803, is also in favour of what the appellants contend. The Court below have taken that part of the summons, which states a loss equal to reserved fund, and £25 per cent. on the capital, but they have not noticed the other part of the summons, which shows the mode by which such loss is said to have arisen, namely, by fraudulent practices and malversations on the part of the directors. This does not bring the case within the 54th clause, for it shows on the contrary, that the Company have perhaps a claim of damages against the directors individually. There is no authority for the investigation which has been ordered: it is not within the terms of the contract of partnership, and the mode is one which is very inconvenient, and must be destructive to the bank, and therefore ought not, under any circumstances, to take place at the present stage of the proceedings, before any *prima facie* case has been made out and established.

The Lord Advocate, and *Rolt*, Q.C., for the respondent. The 3d and 4th pleas could not have been disposed of before the inquiry; there were only therefore the 1st and 2d pleas, which, at this stage of the cause, could have

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been determined by the Court. In point of fact, these pleas were disposed of, for the judgment was pronounced after hearing the parties on the question of relevancy; indeed, if it were not so, and this was not a judgment dealing with the relevancy of the action, it would not be a judgment on the merits, and as there was no leave to appeal, or difference of opinion among the Judges, there could be no appeal thereon to this House; 48 Geo. III. c. 151, sec. 15. Then, as to there being sufficient to support the summons, it is submitted that there is a complete averment of a loss in the terms of the 54th clause of the contract, which would cause the company to be *ipso facto* dissolved. It is not less a loss within the terms of that clause, because it may have arisen in consequence of misappropriation and improper conduct of the directors as detailed in the summons, nor does the summons restrict the loss to one different from that contemplated by the terms of the 54th clause. Besides, independent of the charges against the directors personally, it is stated by the respondent, that the Company does not carry on the business of bankers, for which they were established, and that they have not the means of doing so. There is enough stated, therefore, either to make the Company *ipso facto* dissolved, or else to make it very desirable that it should be put an end to. The investigating the accounts is part of the proof of the respondent's case, and it cannot be more satisfactorily done than by the accountant, who is an officer of the Court, and who will go over to Glasgow, and take the accounts in a way which will not stop or unnecessarily interfere with the business of the Company.

Anderson, Q.C., replied.

The LORD CHANCELLOR. My Lords, this appeal arises out of an action raised in the Court of Session in Scotland, in which a shareholder in this banking company, desired to have it declared, either that by force of the proviso contained in the partnership contract, the company has become *ipso facto* dissolved, or else that under the circumstances alleged, the company should be dissolved and wound up. The Lord Ordinary made a certain order of reference, which order was affirmed by an interlocutor of the Court of Session, and this is now appealed from. In the first place, it is insisted upon by the appellants, that it was not competent to have any such reference, and next, that even if it were, no *prima facie* case has been made out to entitle the party to such reference; further, that it is excluded by the terms of the partnership deed, which creates a *forum domesticum*; and lastly, that it is an improper order, inasmuch as it amounts to the destruction of the bank. It was insisted on the part of the appellant, that the allegations in the summons did not bring the losses in the bank down to the time when the action was commenced, but I think that this cannot be maintained, and that the allegation of a loss which will amount to a dissolution of the Company, is alleged sufficiently, to give jurisdiction to the Court to make the order of reference. But in the first place, I will make some observations on the question of relevancy. By the Act of Geo. III., the appellant could not come to this House, if the judgment appealed from was only interlocutory, and the appellant is now forced to assume that the interlocutor appealed from, is on the merits, as there was here no difference of opinion among the Judges, or leave given to appeal. But then it is said, that admitting it was on the merits, yet no judgment on the relevancy of those merits was given. I am of opinion, however,

that this objection cannot be maintained; for the reference to the accountant is of itself a judgment on the merits, for the purpose of making the necessary investigation, it amounts to a judgment on the pleadings, which entitled the Court to make this reference. It is to be observed also, that the point of relevancy was argued before the Lord Ordinary and the Judges of the Court of Session. (His Lordship here read the interlocutor of the Court below, in which it is recited that their Lordships had heard parties fully on the question of relevancy,) so that not only was the question of relevancy included in the judgment, but the very matter was fully heard by the Court. The objection, therefore, cannot be maintained, and if it could, the effect of it would be only to prevent the appellant having a right now to appeal. It was then said that no *prima facie* case had been made out to entitle the respondent to the order, but if this is not a sufficient *prima facie* case, I cannot understand what more the appellant would have, since, for this purpose, it must be assumed to be true, what is alleged by the respondent. The proviso in the deed of the Company, is, that if it shall at any time be found, on balancing the Company's books, that losses have been sustained equal to the reserved fund, and twenty-five per cent. on the advanced capital, such loss shall, *ipso facto*, dissolve the Company. Now, independent of that, the respondent says, that the conduct of the directors has been fraudulent, and that not only has there been reckless trading, but that the directors have carried on the business of general merchants, instead of the proper business of a banking company, by which means a loss has accrued, which renders it impossible for the bank to continue its business; that, my Lords, is of itself enough to shew the insolvency of this bank, and to maintain an action of this sort in Scotland, supposing the pursuer is not estopped from doing so. Now, it would be a singular argument, if the loss were such to make the directors personally liable, but not a loss which would put an end to the partnership, if the directors have in fact reduced the capital below the amount sufficient to carry on the business.

Now, my Lords, if a sufficient case to proceed on has been made out, is the right barred by the articles of partnership? The articles are restrictive, but not improperly so, in order to exclude shareholders from a general inspection of the books, and for preserving secrecy whilst the business of the bank is carried on. In deciding this case, I should wish carefully to guard myself against being understood to hold that a partner can, on any general allegation, come and break up the partnership; if this case can be sustained by the respondents, it must be so on its own grounds. Now, the 54th clause of the partnership provides, that if, on the balancing of the Company's books, there shall be a loss such as these described, the Company shall be put an end to; it is insisted on the part of the appellants that this means only the balancing exhibited at the general meetings of the Company; it is not necessary to decide that it does not mean that, for it may mean that and something beyond it. It is impossible to say, that if the directors have made out false accounts, one is to be bound by them; there is nothing which excludes fraud, it is a case not within the partnership deed. The respondent here takes upon himself to prove, that on the examination of the books of the Company, there will appear such a loss as by the partnership deed will dissolve the Company. Why should not that fact be ascertained, as it is not one which goes contrary to the deed,

Dec. 3. 1852. but with the intent of it? The directors do not assert that they have assets with which to carry on the concern, or that the case has not arisen which would put an end to the Company according to the terms of the partnership deed. They do not tell you what steps to take, but their object is clearly to get rid of any investigation of their accounts, which has been directed by the Court. I am clearly of opinion, my Lords, that this interlocutor should be affirmed, but I must add, that I wish to guard myself from saying that which may be considered as sanctioning any partner wantonly, and without great cause, coming to the Court to break up the partnership. I am clearly of opinion that the accounts ought to be taken in such a way as not to interfere unnecessarily with carrying on the business of the Company, and I therefore heard with satisfaction that the accountant was to go to Glasgow and there examine the books, and your Lordships will expect that this should be strictly carried out. With respect to the investigation being conducted with secrecy, the accountant is an officer of the Court, and I think the books may safely be placed in his custody. I hope, however, that he will not allow them to be inspected by any customer of the bank, or other person, in the course of the investigation.

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<i>Grahame, Weems, and Grahame, Westminster,</i>	}	Agents for the Appellants.
<i>Wotherspoon and Mack, Edinburgh,</i>		
<i>Law, Holmes, Anton, and Turnbull, Solicitors,</i>	}	Agents for the Respondent.
London, and		
<i>Campbell and Smith, Solicitors, Edinburgh,</i>		

No. 5.

CATHCART v. GAMMELL.

Entail—Statute 1685—Two Deeds—Prohibitory Clauses by reference.—A., in 1815, entailed his estate by a deed, containing the proper fetters of entail, and reserving to him a power of alteration and revocation. Under that deed the succession was destined to G., as substitute heir of entail. In 1823 A. executed a second deed, by which he revoked the order of succession under the first deed, and disposed the estate to G., as institute heir of entail, and after him to a long line of substitutes, not named in the first deed. The second deed contained no precept of sasine nor procuratory of resignation, nor the usual prohibitory clauses, but it assigned to the disponees and heirs of entail mentioned in the second deed, the procuratory of resignation and precept of sasine in the first deed, and obliged the granter to infest, subject to the prohibitory clauses expressed in the first deed:—*Held*, 1st, That the precept of sasine could not be assigned by the granter, and could not, under the change of circumstances, be applied to the second deed: 2d, That the two deeds could not be conjoined as one deed, and, therefore, the want of the prohibitory clauses in the second deed could not be supplied by reference to the first deed: 3dly, That there is no such obligation on G., the institute heir of entail under the second deed, as to compel him, by the direction of this House, or of the Courts below, to execute a regular deed of tailzie, binding himself by the fetters in the deed of 1815. The case of *Fraser v. Lord Lovat*, (1 Bell's Appeal Cases, 105), commented on.

Ho. of Lords. By disposition, dated 7th December 1815, Mr James Gammell, then fee-
Dec. 18. 1852. simple proprietor of the lands of Countesswells, gave, granted, and disposed
Cathcart v. those lands, to himself in liferent, and to William Gammell, his grandson, in
Gammell. fee; "whom failing, to the heirs-male of his body; whom failing, to James
Gammell, son of Lieutenant-General Andrew Gammell, and the heirs-male
of his body; whom failing, to Andrew Gammell, (the present respondent),
and the heirs-male of his body; whom failing, to Ernest Gammell, and the

heirs-male of his body ; whom failing, to the heirs-female of the body of the said William Gammell ; whom failing, to the heirs-female of the body of the said James Gammell, son of the said Lieutenant-General Andrew Gammell ; whom failing, to the heirs-female of the body of the said Andrew Gammell ; whom failing, to a long line of other substitutes.

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The deed contained an obligation on the granter to infeft himself and "William Gammell, and the heirs of entail substituted to him in the order before mentioned." The procuratory of resignation embodied the whole of the prohibitory, irritant and resolute clauses, which are usual in entails ; and the assignation to the writs and titles was in favour of the maker of the deed in liferent, and to the said William Gammell in fee, whom failing, to the said heirs of tailzie. The deed also contained, in favour of the granter, the following power of alteration and revocation :—"But saving and reserving, nevertheless, full power and liberty to me, at any time in my life, and even on death-bed, not only to alter the said course and order of succession, as to the said William Gammell, and all the heirs of tailzie before specified, and to revoke or alter all or any of the conditions, provisions, restrictions, irritances, and others before written, and to revoke this disposition in whole or in part, at my pleasure, but also to sell, alienate, wadset, or dispone the said lands and estate, or any part thereof, or contract debts thereupon, or even gratuitously to dispose thereof as I think proper, and likewise to empower and authorise the said William Gammell, or any of the said heirs, or any other person or persons whom I shall please to name, to suspend or dispense with the foresaid conditions, restrictions, and irritancies, or any of them, after my death, in the same manner as I could have done during my life : All which revocations or alterations to be made by myself, or any other person to be appointed by me as aforesaid, shall be made and done by writing, under our several hands respectively—which writing or writings shall be understood and taken as a part of this present deed of tailzie, and shall be as effectual to all intents and purposes as if the same had been inserted herein."

The deed also contained warrant for recording the same in the books of Council and Session, and Register of Taillies, and to expedite charters and infeftments thereon, as also precept of sasine in the common form, for infefting the said James Gammell in liferent, and the heirs above mentioned in fee, but with and under the provisions, declarations, limitations, restrictions, and clauses irritant and resolute, expressed in the said deed. The deed was recorded in the Register of Tailzies, by Mr James Gammell, on 29th February 1816.

In April 1823, Mr James Gammell executed a new disposition of the lands, which last deed, after proceeding on the narrative of his having executed the previous disposition, and of his reserved power of alteration, thus proceeded : "And whereas I have now resolved to alter the foresaid course and order of succession, I have therefore revoked, and do hereby revoke the foresaid nomination of the said William Gammell, James Gammell, Ernest Gammell," &c., (naming all the parties mentioned in the former deed, except Andrew Gammell, the respondent) "and the heirs-male and female of their own respective bodies, and do hereby declare the said disposition and deed of entail, in so far as concerns the said William, James, Ernest, Martha, Mary, Margaret,

Dec. 13. 1852. and Jessie Gammell, and the heirs-male and female of their respective bodies, null and void; and in their place I do hereby nominate and substitute the persons after-named: And I do, by these presents, give, grant, alienate, and dispose to and in favour of myself in liferent, and to the said Andrew Gammell," (the respondent,) "in fee, and the heirs-male of his body; whom failing, to the heirs-female of his body; whom failing, to George James Cathcart, second son of Hugh Cathcart, Esquire, sometime residing in Bath, now deceased, and the heirs-male of his body; whom failing, to Andrew Cathcart, third son of the said Hugh Cathcart, and the heirs-male of his body; whom failing, to John Andrew Cathcart, eldest son of the said Hugh Cathcart, and the heirs-male of his body; whom failing, to other substitutes, none of the persons mentioned as substitute heirs of entail in this second deed taking anything under the deed of 1815.

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This deed of 1828 contained no precept of sasine, nor procuratory of resignation, in favour of the granter and the other heirs in the new destination contained in that deed; but it contained an obligation on the granter and his heirs to infest and seise himself, and the said Andrew Gammell, (the respondent), and the heirs of that destination, and also an assignation by the said James Gammell to the unexecuted procuratory of resignation and precept of sasine in the former deed, in the following terms:—"And I bind and oblige me to infest and seise myself and the said Andrew Gammell, son of the said Lieutenant-General Andrew Gammell; whom failing, the heirs of entail hereby substituted to him as aforesaid, in the foresaid lands, in manner and on the terms specified in the foresaid deed of entail, with and under the burden of the provisions, conditions, restrictions, limitations, declarations, clauses irritant and resolute. expressed in the said deed of entail; all which clauses I hereby confirm, and do hereby assign to my said dispoonees and heirs of entail in their order, the procuratory of resignation and precept of sasine, and whole other clauses in said deed of entail: Declaring that the said Andrew Gammell, and the persons substituted to him as aforesaid, shall be entitled to possess the said lands under the foresaid deed of entail and these presents, and on no other right or title whatever; and also, that the said Andrew Gammell, son of the said Lieutenant-General Andrew Gammell, and the heirs of entail hereby substituted to him in the order before mentioned, shall be obliged to record these presents in the Register of Tailies, as also in the Books of Council and Session, in case the same shall not have been done by myself," &c., . . . "and severally, to cause present this deed before the Lords of Council and Session judicially, and to procure the same recorded in the Register of Entails, and to expedite charters and infeftments on the said deed of entail and these presents, agreeably to and in terms of the Act of Parliament concerning tailies." This deed was recorded in the Register of Entails, and also in the Books of Council and Session, in 1828, after the death of the granter, the said James Gammell.

The respondent proceeded in 1829 to make up titles to the said lands, by expediting infeftment upon the precept of sasine contained in the deed of 1815, embodying at length, in the infeftment, the provisions, restrictions, and limitations of the entail of 1815. Afterwards, the respondent was advised that the infeftment so taken was inept, and he therefore proceeded to make up a

title of new to the said lands under the deed of 1823, by obtaining, in November 1843, a decret of adjudication in implement, against the heirs of the said James Gammell, and taking an infestment on the charter of adjudication in favour of himself and the other heirs substituted to him by the deed of 1823. Dec. 13. 1852.
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The respondent, in October 1845, sold part of the lands for L.1250, to a Mr Alexander Burnett Whyte, and for the purpose of setting aside the title made up in 1829, as inept, and of ascertaining the respondent's right to sell for an onerous consideration, the respondent brought an action of reduction and declarator, whilst the purchaser, Mr Whyte, at the same time, presented a suspension as of a threatened charge, for the price. Defences were lodged to the respondent's action of declarator, on the part of the appellant, one of the heirs substituted to the respondent by the deed of 1823, and he raised a counter-action of declarator against the respondent.

The action of reduction and declarator at the instance of the respondent, the counter-action at the instance of the appellant, and the suspension at the instance of Mr Whyte, having been conjoined, the Lord Ordinary made great avizandum to the Lords of the First Division, who, on advising the same, pronounced the following interlocutor:—"20th July 1849.—The Lords, on report of Lord Wood, and having considered the revised cases in the conjoined processes of suspension, and of reduction and declarator, and having heard the counsel for the parties,—in the suspension, Repel the reasons of suspension, and find the letters and charge orderly proceeded;—in the reduction and declarator at the instance of Andrew Gammell, Esq., (the respondent,) Repel the defences, and reduce, decern, and declare, conform to the conclusions of the libel as amended;—and in the declarator at the instance of Sir J. A. Cathcart, Bart., (the appellant,) Sustain the defences, assoilzie the defender from the conclusions of the summons, and decern: Find no expenses due to either party."

From this interlocutor the present appeal was brought.

Bethel, Q.C., and *Bruce*, for the appellant. The deed of 1823 is not a distinct and substantial deed, but it must be taken in conjunction with, and as being incorporated with, the deed of 1815; if that be so, then the title made up by the respondent in 1829 was good, and there is a strict entail. It was said in the Court below, that the precept of sasine requires to be delivered according to the terms of the limitations, and that the warrant for infesting in the deed of 1815 had expired, but, it is submitted, that this is not correct, because the precept of sasine accompanies the limitations, and is subject to the power of revocation which accompanies such limitations, and, when the power is executed, it becomes ingrafted on the latter deed in favour of the new limitations. The respondent, therefore, rightly availed himself of the precept of sasine in the deed of 1815, when he made up the title in 1829. The Court below rested their decision on the following decisions, *Broomfield's case*, Mor. 15,618; *Paterson v. Leslie*, 7 D. 950; and the case of *Lord Aboyne*, 4 D. 843; but these are distinguishable from the present case, as in those cases the latter deed was a supplemental or new deed, and incapable of being conjoined with, and not intended to be taken with, the first. Here the respondent, Andrew Gammell,

Dec 18. 1852. Cathcart v. Gammell. became an institute under the power contained in the deed of 1815, and there was, therefore, nothing at variance with the feudal warrant of sasine, according to the law relative to conditional institutions laid down by Lord Mackenzie in *Foyo's case*, 4 D. 1124. The following authorities are in support of the appellant's proposition, that the two deeds taken together created a binding entail,—*Don v. Don*, Mor. 15,591, and Rob. app. cases, 76; *Laurie v. Spalding*, Mor. 15,612; *Vere v. Hope*, 11 Shaw, 520; *Porterfield v. Stewart*, 5 Wils. and Shaw, 515; *Strathmore v. Strathmore's Trustees*, 15 Shaw, 449: 1 Robinson, 189. In the next place, assuming that the two deeds are independent, and that the deed of 1823 is not subject to the fetters of entail, except as *inter hæredes*, still the respondent is bound to take up the estate under the entail, and is obliged now to execute such a valid deed of entail as shall render the fetters effectual against third parties. For this, the case of *Fraser v. Lord Lovat*, 1 Bell's Appeal Cases, 105, is directly in point. [The case of *Carmichael v. Carmichael*, 16 Faculty Cases, 17, was also referred to.]

The *Solicitor-General for England*, (Sir F. Kelly), and *Anderson, Q. C.*, for the respondent. No valid entail was created by the deeds of 1815 and 1823 capable of operating upon the parties to this suit. The deed of 1823 contains not the fetters of entail as prescribed by the Act of 1685, and the reference to the fetters contained in the former deed will not do to supply the deficiency, for the respondent is a substitute in the former deed, and the clauses, irritant and resolute, do not apply to him as institute, which is the character under which he takes under the 2d deed. Sandford on Entails, 155; *Garnet*, Morison's Dict. 15,596; *Montgomerie v. Eglington*, 2 Bell's Appeal Cases, 149. Next, the respondent was not bound by the title made up by him in 1829, *Gardner v. Gardner*, 9 S. and D. 188; the title so made up was inept, for the sasine was taken under the precept of sasine, in the deed of 1815, which could not be assigned, nor warrant the infefting the respondent as institute, and the new series of heirs introduced by the deed of 1823. Lastly, the respondent is not now bound to execute a deed of entail, containing the clauses, irritant and resolute. The case of *Fraser v. Lord Lovat* is distinguished—there, Mr Fraser had not made up any title, here the title has been made up, and the statute of 1685, steps in and prevents the entail being effectual. The following cases were referred to. *Stewart v. Fullerton*, 4 W. and Sh. 196; *Bruce v. Bruce*, 4 W. and Sh. 240; *Elibank v. Murray*, 1 Sh. and Macl. 1, and *Sharpe v. Sharpe*, 1 Sh. and Macl. 594.

Bethel, Q. C., replied.

LORD CHANCELLOR. My Lords, this case, which is of great importance with reference to Scotch conveyancing, undoubtedly has occupied a great deal of your Lordships' time, but that has afforded me an opportunity, from time to time, of looking into the case, and I therefore am enabled to dispose of it, at least to my own satisfaction, without taking further time to consider. It is a case, however, of so much importance in point of the technical rules of conveyancing in Scotland, that it deserves the most serious consideration. It is an attempt, if possible, to place the law, which at present certainly is not in a very satisfactory state, upon a sure foundation—I say, not in a very satisfactory state, not that I think there is any real doubt about the rule, but that the cases have so embarrassed the matter, that certainly it is impossible to say

distinctly what the authorities do now uphold as the rule. My Lords, the whole question, as regards entails under the whole Scotch law, depends upon the Scotch statute of 1685—that statute certainly did not create entails or prohibitions, but it authorised parties who created tailzies, by inserting clauses in the instrument itself, and following that up in certain forms there prescribed, to insert in their tailzies, prohibitory, irritant, and resolute clauses, which by their effect should be binding as against even creditors and onerous purchasers. The distinction is perfectly established, that there may be a good tailzie *inter hæredes*, which still will not bind either creditors or onerous purchasers; and it is undoubted that there may be a reference by one deed creating an entail, to another which has the proper fetters, or fetters which would be binding *inter hæredes*, and yet that might not be binding against creditors or onerous purchasers. Now the whole of this case turns upon the question whether the two deeds to which I shall presently call your Lordships' attention particularly, do or do not authorize the present institute, the person who is instituted, namely the pursuer Andrew Gammell, to make the sale which he has made, and if that be held to be valid and binding, then on the same principle, your Lordships will have to hold that he has the same power over the remainder of the estate.

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Now, the Judges in Scotland, for a very considerable period, tried all that they could do to establish the right in heirs of tailzie, to have some remedy against the person who broke the fetters, supposing them not to be properly imposed according to the statute of 1685. They attempted in the first place, by inhibition, to prevent the party from breaking the prohibitory clauses. That was ultimately over-ruled, and in most of those questions, this House disagreed with the Courts of Scotland upon those points. It was decided that there could be no right to interfere on the part of the Courts of Scotland—that the prohibition must work by its own force, and could not be enforced in an indirect way by interference by the Courts of Scotland. It was then insisted that the heir, if disappointed, would have the right of proceeding for damages. That again was negatived; and it is perfectly clear that if the fetters are not properly imposed according to the statute, then although the estate be sold, or creditors be let in contrary to the intention of the settler, yet no right to damages remains to the person who is disappointed of his rights under the instrument. Then came the great question in these cases which is in *Bruce v. Bruce*, 4th Wilson and Shaw. That question was, whether or no the party, the tenant entail, although he might have sold, so as to escape the fetters as regarded the purchaser, was not bound upon a supposed equity or obligation to invest the money which he received from the sale of the entailed estate in the purchase of other estates to be settled in the like manner. Now the points were very well discussed, and ultimately this House, reversing the orders of the Courts of Scotland, established, and I think I may say properly established, that no such right existed.

No doubt therefore remains that the law is this, that in all these cases you must impose the fetters according to the statute of 1685, so as to be binding by their own force in the instrument in which they are found, or there can be no rights.

Now, my Lords, having just stated what I consider the law to be, I will

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proceed to consider what the settlements were in this case. And first comes the regular deed of tailzie, with proper prohibitive, irritant, and resolute clauses. I will assume they are proper clauses,—no question has been raised upon that. [His Lordship here read the material clauses of the deed of December 1815.] The settler had, therefore, settled the estate upon a certain person named as the institute, with remainder over to certain heirs-substitute, and, by the law of Scotland, Andrew was a substitute heir of entail under that deed, having certain persons before him, and certain persons after him. [His Lordship then read the recital and other material parts of the deed of 1823.] My Lords, the question which your Lordships have now to determine is, Whether the fetters, which are properly, I assume, inserted in the deed of 1815, but which are not repeated in the deed of 1823, do apply to the new limitations to Andrew in the deed of 1823, although not in terms complying with the statute of 1685,—that is to say, whether the deed of 1823 will be an independent deed, those prohibitive, irritant, and resolute clauses not being imported as they ought to be according to the statute of 1685?

Now, my Lords, I must first of all dispose of the question as regards the precept of sasine. I entirely agree with the Court below in the view which was taken with regard to these rights. I think, of course, he could not assign, as he attempted to do, those rights, because they were rights which he had granted. The grantee might or might not restore those rights, but the granter of those rights never could assign them to another person; and, therefore, the only question was, Whether or not the precept of sasine in the original instrument of 1815 could be applied to the deed of 1823, under the change of circumstances. The change of circumstances, your Lordships will observe, amounts to this, that Andrew, who was before the substitute-heir of entail following other persons, and might never, therefore, have acquired any interest in the estate if that deed had remained unrevoked, became institute heir of entail by the removal by the deed of 1823 of those persons who preceded him. I agree, that however you may remove a man out of an entail, the others will succeed in their regular limitation, whether he is removed by deed or otherwise; no doubt it is laid down that the substitute-heirs will take, but here is a question of a different nature:—Can you take in the precept of sasine which was intended to give effect to the deed of 1815, and transfer that to the deed of 1823? I think, for the reasons stated by the Court below, my Lords, that that cannot be done. Therefore, the question stands now before your Lordships, as I understand it, upon two points. First of all are the two deeds, so mixed together as to form one deed, and, therefore, that the want of the prohibitive and the other clauses which are found in the deed of 1815, is supplied by reference in the deed of 1823, and the clause relied upon at the end of the deed of 1815.

Now, I must observe in the first place, that the deed of 1815 was registered in 1816, in the lifetime of the settler, and, therefore, though it was not done at the time, it was certainly rendered a perfect instrument in the lifetime of the settler; and it was admitted in the able argument which your Lordships heard upon the part of the appellant, that if the deed of 1815 had been feudalized, there must have been a new infeftment to give effect to the deed of 1823.

My Lords, the second point is, supposing the two deeds do not, if taken

together, amount to a strict entail under the statute of 1685, then is there such an obligation imposed upon the heir of entail, according to the *Abertarff* case, decided in this House, as shall compel him, by the direction of this House, or of the Courts below, to execute a regular deed of tailzie, binding himself by the fetters in the deed of 1815. Dec. 13. 1852.
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Now the first question, namely, whether these two deeds can be conjoined, and read together as one deed, is a simple question of Scotch conveyancing; but it is a very important question, and it behoves this House to be very careful not to unsettle the law, if it be settled, upon that subject. Now, my Lords, I propose, with that view, that your Lordships should consider a little how the cases stand upon that subject. The case which was so often referred to in *5 Wilson and Shaw, of Porterfield*, amounted to nothing more than this, that there was a settlement, with a power of revocation and substitution *hæredibus nominandis*. Now, that power was executed without an attempt at any new conveyance; therefore it really amounted simply to this, that disturbing nothing, and merely executing that power in the way of substituting other heirs, it was held by the Court of Session, and, on appeal, confirmed by your Lordships' House, "that the deed of nomination was a valid exercise of the faculty to name heirs—that an heir called by it was preferable to an heir called by a posterior substitution, and that prescription had not taken place so as to exclude the former." My Lords, that clearly settled that, which I apprehend is not to be disputed in the law of Scotland on this point, that if there be a power of revocation in a deed, and that power of revocation, particularly where there are heirs, merely to alter the destination of heirs, is authorised to be executed, and can be executed, and is executed by a mere instrument introducing the alteration—that there a new nomination takes place as a part of the original instrument; and whatever fetters were imposed by that original instrument, are imposed upon the settlement as it stands by alteration. So that I see no objection. In the law of England the thing is done, though standing upon wholly different grounds. We require no seisin of investiture; we have a mode of operating upon a supposed seisin, which exists not in fact, but exists in law, by which you do that which is done by seisin, and obtain the effects flowing from that seisin without the slightest difficulty. In the law of Scotland, if you want an absolute deed, or a deed sufficiently divided, you must do it by a new instrument; but where you have a power, and that power is exercised by simple nomination, and warranted by the power, without any disturbance of the estate itself, there it is perfectly settled that you may alter the destination, and that the original deed will ultimately stand and have effect, with all the fetters in that deed precisely as if the person substituted by the nomination had originally been introduced in the place of the person who is so superseded. So far there can be no difficulty at all. But it must be borne in mind that the case of *Porterfield* was only between heirs, and was not a question of binding creditors or onerous purchasers.

Then, my Lords, there is a case which I have no doubt is very difficult to deal with; that is the case of *Laurie v. Spalding*, which is in *Morison*, 15,612. Now, as I understand that case, one would have supposed it was not open to the slightest doubt, for there being a settlement, with general prohibitory and other clauses, the party bought another estate, and of that estate he took a

Dec. 13. 1852. conveyance, and that conveyance simply referred to the former settlement. Now, if any thing be well settled by the law of Scotland, it is as an abstract question, that you cannot in that way impose fresh fetters under the statute of 1685, and here there was a purchaser, with a purchase not for the mere sake of trying the title, but the estate was sold. But all the fetters were held to be well imposed, and that was simply done, as I understand it, by a mere reference to the preceding settlement. Now, if that were the law, it would be very difficult to say how it would stand. But your Lordships will find it is not treated as law; and it is explained in 4 Bell and Murray, in a way which perhaps may account for the decision there by the Judges. The judgment there was delivered by one of the learned Judges, but it was the opinion of seven learned Judges. The observation in page 859 of 4 Bell and Murray, is this;—"The case of *Laurie v. Spalding*, is, however, materially different, as I read that case, it certainly did come to be a question between an heir-substitute of entail and a purchaser; and one general plea maintained for the purchaser was distinctly, that the entail of the lands of Ervies, by mere reference from one deed to another, could not be effectual against creditors and purchasers, as not being duly recorded in the terms of the Act 1685. The case was perplexed in its circumstances; and there was a specialty strongly urged, which almost certainly affected the decision, that the purchaser had dealt with the heir in possession at a time when he had only a personal right to the property; in which case, the general rule is, that the purchaser is affected by all the qualities of his author's title. Accordingly, I find that that case having been appealed, this was the point mainly relied on in the respondent's appeal case. Nevertheless, if there were no authority against it, I should find it difficult to extricate that case from the peculiarities of the titles, which had been constituted in the vendor before the question came to be tried." Mr Sandford, in his book upon entails, page 157, says, he thinks the case is not defensible as an authority, if it proceeded upon the ground that the fetters were properly imposed as against the purchaser, and I take it, that if it had been determined upon that ground it would be over-ruled by the other cases. It is a case, therefore, upon which your Lordships are not called to express any opinion, and I shall take it for granted, that it is not an authority which bears upon the question now before your Lordships.

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Now, my Lords, there is nothing more clear therefore, than that a mere reference by one deed to another, as regards prohibitory, irritant, and resolute clauses is directly and in terms struck at by the statute of 1685. Reference has been made to the case of *Broomfield and Paterson*, Morison, 15,618. That was a question by creditors against heirs, and, therefore, it introduces a question about creditors; but there is no doubt whatever, as I understand that case, that the second deed was a new deed, it was held to be a new deed, and it clearly was a new deed. I cite it for the purpose only of shewing that that, as one of the leading authorities, has established, that mere reference from a later deed to an earlier deed will not, under the statute, enable you to make the irritant and resolute clauses binding upon the settlement under the later deed. That case came before your Lordships' House upon appeal, and the appeal was dismissed, and the interlocutor affirmed. Now, my Lords, there was the case of *Lindsay v. Lord Aboyne*, 4 Bell and Murray, 843. That

was upon the 2d of March 1842. Now, in that case, the original settlement Dec. 18. 1852.
 having contained fetters, a supplementary settlement was executed, and, as
 here, it referred to fetters; but that was held not to be good, because, although Cathcart v.
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 the settler meant to attach it to the other, and to make a supplemental settle-
 ment, yet the law was too strong for the intention, because the statute pre-
 scribed the mode, and not having satisfied that, the statute prevails against it.
 My Lords, I have stated the date of that case for this reason, that although
 the case of *Fraser v. Lord Lovat*, was heard in March 1841, judgment was
 not given by this House until the end of February 1842. It is apparent,
 therefore, to me, that the judgment of your Lordships' House could not have
 been known in Scotland at the time that judgment was given in *Lord Aboyme's*
case; consequently, it is clear that that rule was maintained without knowing
 what had been the fate of *Fraser's case*. But we must bear this in mind, that
 this House did not establish any thing new of itself in *Fraser's case*, what-
 ever may be the weight, or whatever may be the true interpretation of that
 case; but the House affirmed that which was settled by the Court in Scot-
 land. This House did not set up a rule contrary to what had been established
 in Scotland, but it took the rule as it found it laid down in Scotland in that
 case, and simply affirmed what the Court of Scotland itself had done in re-
 versing its own former decision. Now, my Lords, let us see exactly, for
 every thing depends upon this, what it is that *Fraser v. Lord Lovat* decided, for,
 in point of fact, it bears upon the two questions, which become united in some
 sense. If this case could be shewn to be similar to the case now before your
 Lordships, as regards the union of two deeds, or if not, if it could be shewn
 that your Lordships should now decide that Andrew Gammell is compelled to
 execute a regular deed with all the fetters, that case, in either view, would be
 an authority upon which the appellant could rest.

Now, my Lords, in that case, I think it is to be lamented that the judgment
 was so long delayed; of course it gives your Lordships a great opportunity of
 considering the case, but there is always a danger of some of the points
 escaping attention at so great a distance of time. It does not appear clear to
 me, after the most diligent attention I have given to this case, that the point
 which we have been agitating here, as regards the operation of the statute of
 1685, upon the second deed, was really a point in issue there; nor do I find
 it even in the appeal cases delivered to the House. [His Lordship here read
 "the reasons" from the cases delivered in that appeal.] In point of fact, as
 you find, my Lords, in the advice given to this house by the noble and
 learned Lord who then held the Great Seal, the subject as affected by the
 statute of 1685, was really not discussed; and it seems to me rather to have
 been taken for granted, that if there was a sufficient reference in the subse-
 quent deed to the prior deed, that second deed would be embodied as part of
 the first. My Lords, in that case you will find that the deed of 1812 is in
 this form. The party having a full power to revoke under the deed of 1808,
 (I pass over the previous fetters, they are not material, they do not bear upon
 the question), says that he had executed a disposition and deed of entail of
 the estate of Abertarff, and so on, and he puts the date of that in blank, and
 that blank has been supplied by referring it to the deed of 1808; then he
 says he had power to make an alteration in the estates. [His Lordship here

Dec 13. 1852. read the operative part of the deed of 1812, which was a nomination of the settler's grandson, Thomas Frederick Fraser, and the heirs male of his body, to succeed to the lands and estates immediately after the settler, and the heirs of my own body, and a disposition of the said lands accordingly.] Now, your Lordships will observe the frame of that instrument, that it amounts to a nomination under the power of revocation. The only thing done by this deed is to alter the destination, under the power which enabled the settler to do so, and although there are the words of disposition, yet those are not followed up by any direction as to a sasine, or any direction with regard to the investiture in any way whatever; but this second instrument is left simply, and only upon the nomination made by the settler; and then it appears to me to be entirely governed by the cases. In the deed of 1808, there were all the fetters. Then if the deed of 1812 simply did adopt the deed of 1808, and only altered the destination according to the power which the settler had, then those two deeds united and conjoined, did contain all the fetters, and the fetters were properly imposed upon the parties in the second deed, not only by the first deed, but also by force of the settlement. That appears to me to be entirely consistent with the speech, and the advice contained in that speech delivered in your Lordships' House, by my noble and learned predecessor. My apprehension therefore, is, that this House had no intention whatever to alter the law of Scotland, but that that deed of 1812 must have been considered as not being in the sense in which we have been now considering the question, a new deed removing wholly or in part the old deed, altering the destination undoubtedly; but in that case to be held as forming part of the original deed.

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Now, my Lords, the same doctrine has again come before the Courts of Scotland, in a case to which I will refer. I have already drawn your Lordships' attention to the important fact, that the question in *Fraser's* case did not, according to the view of the parties, turn upon the statute of 1685, and therefore, they must have considered the nomination not to disturb that deed, but to form a support to it, or an addition to it as part of the original instrument. Now, my Lords, there was the case which came before the Court below, of *Paterson v. Leslie*, (7 Bell and Murray, p. 950) that was heard in July 1845. The decision in *Fraser's* case, by this House, was at that time perfectly well known. Now, how did the Scotch Judges deal with the law in that case of *Paterson v. Leslie*. There, there was a regular tailzie, with the power of revocation; and a new deed was executed under that power; but by way of convenience, it referred to the irritant and resolute clauses in the first settlement, though not incorporating them—but the parties meant to bind themselves by the conditions in that respect, contained in the first deed, yet it was held that the second deed was a new entail, superseding the first, and that as it did not contain within itself the foresaid clauses, it was not effectual to protect the lands against creditors. Why? Because, notwithstanding the reference to the first deed, the second deed was held to be a new deed, and there being no sufficient reference to the fetters of the first deed, the old doctrine, and I may say the settled doctrine, of the Courts of Scotland, was adhered to. And singularly enough, so little was *Fraser's* case considered to break in upon the actual rule established in Scot-

land, that it is positively not once, I believe, referred to in this latter case of *Dec. 18. 1852. Paterson v. Leslie*; and you will find it there laid down expressly as it is stated all along. Lord Jeffrey lays it down thus, and I believe it is confirmed by the Lord President and the Lord Ordinary;—"with regard to the analogy attempted to be made out," with the *Porterfield* case, "I think it fails at once. There, the investiture has been made upon the old title; while here the whole of the investiture under the tailzie 1692, has been abandoned, and swept away by the new one under the deed of 1700. If the entailer had made a deed merely altering the previous destination, without a new conveyance of the lands, and put it on the record of tailzies, according to the cases of *Porterfield* and *Don*, that would have been quite competent. But he has gone further, and made an entirely new deed." Now, my Lords, this brings me at once to the question of what is the operation of the deeds in this case? Is the second deed, to which I have called your Lordships' attention, a deed which does not disturb the first deed, or is it clearly within the view really to be inferred from the decisions of the Courts of Scotland, a new deed, so as to require that there should have been upon the face of the deed itself, a statement of the fetters intended to be imposed, and not a mere reference to another instrument in which those fetters were contained. It comes now to be a question with reference to the construction of the instrument, and of the intention of the parties. This gentleman had a right, under the first instrument, to revoke and alter the destination of his estate. He does so, although he leaves Andrew Gammell, no doubt untouched; but he leaves him under his second settlement in a very different position from that in which he stood in the first, for, as I have already said, in the first, he was second substitute heir of entail, and might never have come into the estate; whereas under the new deed, he becomes an institute. The appointment is accordingly again to him in so many different terms; because in terms it is to him in fee. The gift to him is for life simply upon the first deed; but he is introduced here as the institute, and becomes the first taker. Then follows the introduction of an entirely new class of persons, the Cathcarts, the appellants at your Lordships' bar, who no doubt were intended to take this estate according to the intention expressed by the settler, and if the settler's intention is defeated, it will be without doubt, by a technicality, and by the rules of conveyancing which prevail in Scotland; and which certainly your Lordships would not be disposed, and ought not to disturb. Now, by this instrument, after he has re-appointed the estate to Andrew Gammell in a different way, (having revoked the other settlement) he then introduces those several persons as heirs substitute of entail, altering altogether the former disposition of his property. Then, my Lords, comes this clause, after describing the order in which they are to take, he says they are to take "under the burden of the provisions, conditions, restrictions, limitations, declarations, clauses irritant and resolute expressed in the said deed of entail, all which clauses I hereby confirm, and do hereby assign to my said disponees and heirs of entail in their order, the procuratory of resignation and precept of sasine and whole other clauses in said deed and of entail." Declaring that they "shall be entitled to possess the said lands under the foresaid deed of entail, and these presents, and on no other right or title whatever," and that they shall "record

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Dec. 13. 1852. these presents in the Register of Taillies, as also in the Books of Council," and so forth, and then he declares that if the deed be undelivered at his death it shall be as good and sufficient, "as if the same had been completed by infestment, and formally delivered to the said Andrew Gammell, or any other of the heirs of entail, or to any other person for their behoof," and then he grants powers to his procurators or to "Andrew Gammell, or any of the fore-said heirs of entail, jointly and severally to cause present this deed before the Lords of Council and Session judicially, and to procure the same recorded in the Register of Entails and to expedite charters and infestments on the said deed of entail, and these presents agreeably to and in terms of the Act of Parliament concerning taillies," and he consents to a registration.

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Now is this a simple nomination, which, under the authorities, would not disturb the first deed, or is it in effect a new deed? My Lords, after very great consideration, I have reluctantly come to the opinion that this is a new deed. The settler meant this deed to operate without disturbing the title of Andrew, but he also meant this deed to operate so as to introduce a new settlement, and to operate in some respects conjointly with the former deed, not by its own force. But it would be only evading the question to say that because the settler intended the former deed to operate with the later deed, therefore you ought to take them as one deed; that would be to deny all the authorities; for I have shewn to your Lordships that taking the case in which a man buys one estate, and he settles that one estate with proper clauses, and then settles another estate, although he called that a supplemental deed, and meant to add it so that it should form part of his first settlement, and referred expressly to the different powers contained in the first deed, yet the statute steps in, and says, that the party has not adopted the only mode pointed out by the law to give effect to the second deed by fetters, and, therefore, it must stand upon its own force, and cannot avail itself of the fetters under the former deed. So that really it amounts to nothing, to say, that such was the intention. But you are to look further. Is there an intention, (as I think is expressed here), that effect shall be given to the second deed, as if it had taken place by infestment? No doubt, it was intended it should operate with the first deed; but that it should operate by its own force as far as it would, and, therefore, the fetters referred to, as in the first deed, cannot be held to have any effect, because the statute does not admit of that mode of carrying out the intention.

Now, my Lords, if that be true, upon the first point, then the remaining question, and a most important question it is, is, whether or not it is possible to maintain that the Courts have the power, if there be an informal, imperfect settlement, to remodel that settlement in the Courts of Scotland, so as to impose the fetters which the settler himself has failed properly to bind the parties by? Now, my Lords, no such thing has ever been done in Scotland. In the *Abertarff* case, as the party had, in fact, made up a title to himself in fee, whatever was the construction, it was necessary that he should execute a regular deed of tailzie. There is no question about that, that he was bound to execute a new deed of tailzie, and then, of course, the question was, whether he was bound or not to include the fetters in the original deed. I was rather surprised at the argument which was advanced at your Lordships' bar; it never could be maintained, that because it was necessary he should execute a

new settlement, in as much as he had made up a title upon a separate deed, Dec. 18. 1852. that therefore he could be made to impose fetters upon himself, if those fetters were not properly imposed by the deed under which he had improperly made up his title. All you could possibly do, whether he had made up his title one way or the other, was to compel him to make up his title according to the binding nature and operation of the deeds under which he claimed—you could do no more. What would be the effect of any interference of this sort? Simply to repeal the statute of 1685. What equity is there? There never was a greater mistake than supposing that what we call election here, which is called by a different name in Scotland, touches a case of this sort. In the case where there were three estates in a settlement, and it turned out that one of the estates belonged to the person, but the other two came under the settlement, it was held in Scotland, as it would be held here, that the party taking under the deed could not take against the settlement; if you take the two estates which belonged to the settler, you must bring into the settlement the third estate which belongs to yourself. There is no difficulty about that. But what has that to do with the case in which he is to take under a deed? Observe that in that case you attempt to take under and in opposition to the deed at the same time. You cannot be permitted to do that in a court of justice; but it is a totally different question here, because here the party does take strictly under, and only under and not in opposition to the instrument. If you do not effectually make your settlement, the party taking under it may be unable to maintain it, but there is no equity, because the thing might have been done, there is no equity which can compel the party to do it. It stands simply upon its own force, and if it can be executed by its own force, that is valid, otherwise it must fall to the ground. That is all the former decisions do.

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Now my Lords, there is no authority whatever in the law of Scotland to do that which is contended for here. In the *Abertarff* case it was introduced necessarily and inevitably because there was a settlement executed, and it extended the fetters to the second instrument, because it evidently was considered to have been a part of the original instrument and to indicate that the two together formed one instrument. Therefore I recommend to your Lordships to affirm the interlocutor of the Court below, and to dismiss the appeal. My Lords, though I think that nothing can be more wise than that the costs should follow and abide the event, yet in this case it is impossible not to see that the authorities have left the question in a state of great uncertainty and confusion, and I think this would be a very proper case to depart from the general rule of compelling the appellants to pay the costs, having failed in the appeal. I shall therefore move your Lordships to affirm the interlocutor complained of, but without costs.

Interlocutor affirmed without costs.

<i>Richardson, Loch, & Maclaurin,</i>	} Agents for the Appellant.
<i>A. & A. Campbell, W.S.,</i>	
<i>Edinburgh,</i>	
<i>Williamson, Hill, & Williamson,</i> Agents for the Respondent.	

No. 6.

THE SCOTTISH MARINE INSURANCE COMPANY

v. TURNER AND OTHERS.

Marine Insurance—Total loss—Abandonment—Freight.—The *Laurel*, valued at £7500, was insured from Quebec to a port in the United Kingdom, on the ship and also on the freight. During the voyage she encountered an iceberg, which greatly damaged her, but owing to her cargo being timber, she was kept afloat till she neared Liverpool, when the dock-master, refusing to admit her into dock from her disabled condition, ordered her to lie outside to be scuttled when the tide went out. In this position she grounded, and fell outwards, thereby receiving much additional damage. With great labour she was afterwards floated into dock, and her cargo was delivered in safety, and the freight was paid to the owners. She was then examined, and pronounced by competent surveyors to be a mere wreck, only worth £475. The owners thereupon (being three weeks from the date of the second accident) intimated to the underwriters on the ship an abandonment, and a claim as for a total loss. Payment being refused, an action was brought, and a jury found that the vessel was a total loss at the date of the second accident, and was rightly abandoned. The underwriters on the ship thereby became entitled to the freight, which was accordingly paid over to them by the owners. The owners then sued the underwriters on the freight as for a total loss of freight:—*Held*, no action lay, inasmuch as the freight insured was actually earned and received by the owners, who, but for their act in abandoning the ship after such earning and receipt, might have retained such freight for their own use, and therefore the contract of the insurers of freight was strictly performed.

Mar. 3. 1853.

This was an action brought on a policy of insurance of freight, in the following circumstances:—

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The respondents were owners of the ship *Laurel* of Greenock, which was valued at £7500. She was insured to the extent of £6500, the owners being their own insurers for the remaining £1000. The appellants were insurers of the ship to the extent of £1500. The freight was also insured to the amount of £1500, of which £1000 was undertaken by the appellants. This policy effected with the appellants on the freight (on which the present action was brought) was dated 15th July 1842, and bore to be "at and from Quebec to a port of discharge in the United Kingdom," "beginning the said adventure upon the said goods and merchandises from the loading thereof aboard the said ship as above," and continuing upon the said ship "until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed." The risks were described in the usual terms, perils "of the seas, men-of-war, fire," &c. "and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof."

The ship performed her outward voyage with safety, and at Quebec loaded for her return a cargo of timber, staves, and flour. She left Quebec 14th July 1842. On the 27th July she came in violent contact with an iceberg, there being at the time strong breezes and a thick fog. Her bows and topgallant forecastle were stove in, and otherwise she was so injured and damaged that she immediately filled and became waterlogged, and was thus reduced to a wrecked or sinking condition. By the great exertions, however, of the crew, and owing to her cargo being timber, she was kept afloat, and

ultimately arrived off Liverpool on the 11th August. The dock-master, on Mar. 3. 1853. seeing her disabled condition, refused to receive her within the dock, and directed her to be moored outside, so that, when the tide left, she might be scuttled. The result was that she grounded, fell outwards, and sustained much additional injury, many of her timbers being further broken up. When the tide receded, holes were bored in the bottom, and the water allowed to run out; these openings were afterwards closed, and the wreck was ultimately floated into the dock, when the cargo was discharged, it having escaped uninjured. The owners received the freight from the consignees, amounting to £1402:2:2. On the 1st September, after the cargo was cleared out, the owners had the wreck surveyed, and finding her damage so great that the expense of the repairs would far exceed her value, they intimated an abandonment to the underwriters of the ship, and their intention to claim for a total loss. No notice was sent to the underwriters of freight.

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Some of the underwriters of the ship having refused to pay except for a partial loss, an action was brought in Scotland by the owners against one of these underwriters to recover for a total loss. This action was entitled *Stewart v. the Greenock Marine Insurance Company*. The case went to trial on the following issue, "whether the *Laurel*, by and through injury sustained on or about 27th July 1842, and on or about 11th August 1842, or one or other of these dates, and during the currency of the policy (on the ship), became a wreck and was totally lost." The jury returned the following verdict:—"Find for the plaintiffs, in respect that the *Laurel* was properly abandoned, and not worth repairing; that her damage arose from her coming in contact with an iceberg, and also from grounding at the dock at Liverpool. Also find that the ship was perfectly seaworthy, reserving for the decision of the Court the point raised by the defendants of their title to a proportion of the freight. Also find that the vessel was a total loss, irrespective of the decayed timber and deficient sails." With respect to the question submitted by the verdict to the Court, it was afterwards decided by the Court that the underwriters of the ship were entitled to the freight earned subsequently to the 11th August, the date of the accident in the Mersey. An appeal to the House of Lords was entered against that decision, and after argument, Lord Cottenham confirmed it. (See *Stewart v. Greenock Marine Insurance Company*, 2 H. of L. C. 159).

The owners having under the above judgment paid over the freight which they had received, to the underwriters of the ship, brought the present action against the underwriters of freight to recover for a total loss of freight. The defendants demurred, on the ground that there had been no loss of the freight within the policy; that the damage sustained by the ship did not disable the ship from earning freight; and that the owners themselves had *de facto* earned and received the freight. The Court of Session, by a majority of three to one, gave judgment for the pursuer. The defendants now appealed.

Sir F. Thesiger and *Willes*, for appellants (defendants).—The summons alleges that the freight was in fact earned; but it is said, though it was earned in one sense, yet it was not earned by the owners. But we can only look at this contract taken by itself. By the contract of insurance of freight, the in-

Mar. 3. 1853. *Scot. Marine Insurance Co. v. Turner, &c.* surer merely undertakes that freight shall be earned, and not that it shall be earned by the owner; for this reason, that there may be an assignment of the ship during the voyage, in which event the assignee would become entitled to the freight. There was no loss of freight here by the perils insured against; for if there had been no insurance of the ship at all, there would have been no loss of freight. The alleged loss, therefore, can only be caused by the fact that another separate and independent contract had been entered into with the underwriters of the ship, a consequence arising out of which carried the freight to the abandoner of the ship. In such a case the cause of the loss would not be a peril of the sea, or, if so, it would at least be too remote; *De Vaux v. Salvador*, 4 A. and E. 420; *Powell v. Gudgeon*, 5 M. and S. 431. No doubt, freight always goes with the ship; nevertheless, for the purpose of insurance, the ship and the freight are two distinct and independent matters. An abandoner stands in the same position as a purchaser; *Case v. Davidson*, 5 M. and S. 79; 2 B. and B. 387; 3 Moo. 116. And an abandonment is a voluntary act; *MacCarthy v. Abel*, 5 East, 388; S. C. 3 Moo. 151, 3 Br. and B. 151. And it has been held that where an owner abandons the ship, he thereby assigns the freight, and cannot recover against the underwriter of freight; *Morison v. Parsons*, 2 Taunt. 407. In *Benson v. Chapman*, 2 H. of L. C. 721, there was no case where freight had been actually earned, and yet an action for a total loss of freight was maintainable. Such being the law, the parties must have contracted on that basis. The owner knew if he abandoned the ship he must lose the freight; if, therefore, he wished to save himself against this contingency he ought to have expressly stipulated, that in the event of his judging it prudent to abandon his ship, he was not thereby to lose his remedy against the insurers of freight; *Emerigo on Bottomry*, 36—41. The following authorities were also cited,—*Roux v. Salvador*, 3 Bing. N. R. 226; *Cambridge v. Anderton*, Ry. and M. 69; 2 B. and C. 691; *Melish v. Andrews*, 15 East, 13; *Thompson v. Rowcroft*, 4 East 34; *Sharp v. Gladstone*, 7 East, 24; *Leatham v. Terry*, 3 B. and P. 479; *Holdsworth v. Wise*, 7 B. and C. 794; *Samuel v. Royal Exchange Company*, 8 B. and C. 119; *Moss v. Smith*, 9 C. B. 94; *Arnould on Insurances*; *Benecké Pr. of Indemnity*.

Sir F. Kelly, and *Byles*, Serjt., with them *Burnie*, for respondents.—The ship was totally lost on the 11th August, and that total loss existed in point of law and of fact, independent of any notice of abandonment. Whatever rights, therefore, a total loss could confer on the owners, attached on that day, and could not be defeated by subsequent events. It is true the owners in the first instance received the freight; but they did so merely as agents for the underwriters of the ship; and they cannot be prejudiced by that circumstance. That this was a total loss is clear from *Stewart v. the Greenock Marine Insurance Company*, *supra*. From the 11th August the owners had no longer the power to earn freight, because the wreck passed to the underwriters of the ship, and it was the underwriters of the ship, who, in contemplation of law, brought the wreck to port, and delivered the cargo. In England abandonment constitutes a total loss from the time of the casualty; while in France it relates back to the commencement of the voyage; *Emerigon*, c. 17, s. 19; *Code de Commerce*, s. 386; 2 *Phillips' Ins.* 417, ed. 1840. The owners were at perfect liberty on the 11th August to treat the ship as if it had gone to the

bottom of the sea or been annihilated by fire. It is a mere play upon words Mar. 3. 1853. to say that the ship earned her freight notwithstanding. Freight may be, in one sense, earned, and yet totally lost; *Idle v. Royal Exchange Company*, 3 Moo. 115; 8 Taunt. 755; *Read v. Bonham*, 3 Brod. and B. 154. Freight has never been earned here in the sense of the contract of the freight insurer. Scot. Marine Insurance Co. v. Turner, &c. What was got was money which the underwriter of the ship was entitled to by choosing to bring the goods from that part of the sea where the total loss occurred, to harbour. The rights of the owner attach at the time of the total loss. It is absurd to say that when a ship is insured for £6000 and becomes so damaged that it could only be sold for old materials, that it is a voluntary act to choose to abandon and claim the £6000. *Ashmole v. Wainwright*, 2 Q. B. 837; *Powell v. Gudgeon*, 5 M. and S. 431. In *MacCarthy v. Abel* the freight was not lost at all, and the total loss alleged there was one by capture, which is always defeasible on the ship being recaptured. The following authorities were also cited,—*Fleming v. Smith*, 1 H. of L. C. 513; *Everth v. Smith*, 2 M. and S. 278; *Knight v. Faith*, 15 Q. B. 649; *Benecké*, Pr. of Ind. 408; *Benson v. Chapman*, 6 M. and Gr. 792; Arnould on Ins.

The LORD CHANCELLOR, after stating the facts: My Lords, I have given very anxious attention to the able and well reasoned judgments, which fully disclose the grounds upon which the Court below proceeded. Those grounds were these:—First, they considered that there was a total and actual loss of the ship before she was brought into dock. Secondly, that being so, and the ship having been abandoned to the underwriters, or, at all events, notice of the loss having been duly given to them, the damaged vessel became their property as from the time of the fatal injury, say on 11th August. It is immaterial whether it was 11th August or 27th July before she got into dock. Thirdly, the Court considered the legal consequence of such a state of facts as established by *Case v. Davidson*, 5 M. and S. 79, and a case in your Lordships' House, arising out of this very transaction, (*Stewart v. Greenock Marine Insurance Company*, 2 H. of L. C. 159), to be, that freight accruing due after 11th August, (which includes all the freight of the ship), belonged not to the owners, but to the insurers of the ship, and so was lost to the owners. Fourthly, the Court held that the cause of this loss of freight to the owners was the loss of the ship by perils of the sea, and so the freight was lost by one of the perils insured against. These are the grounds upon which the Court of Session proceeded. But, with all respect to the distinguished persons by whom these judgments were pronounced, I think they rest on an unsound foundation. I do not think that, as between the parties in this cause, it can be said that the ship was totally lost during her voyage. That she was not in fact lost, is certain, for she arrived at Liverpool—was there brought into dock—her cargo was safely delivered to the consignees—and the freight was paid to the owners. But how then, it may be said, is this consistent with the verdict of the jury in the action against the underwriters of the ship, which finds expressly that the vessel was a total loss, irrespective of the decayed timber and deficient sails? To this I answer, that the verdict was altogether *res inter alios acta*. As between the underwriters on the ship and the assured it might be proper to treat the damage as a total loss. But it does not there-

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fore follow that it can be so treated between the owners and other persons ; as between the owners, for example, and the underwriters of the freight. When it is said that, as between the owners and the underwriters of the ship, there had been a total loss, all that is meant is, that the circumstances of the case were such as gave to the owners the same rights against the insurers of the ship as if there had actually been a total loss. It does not by any means follow that the same circumstances will give to the owners similar rights against other persons. When the cargo was delivered to the consignees and the freight paid, the owners might, if they had thought it for their interest, have retained the damaged vessel, and come on the insurers for the cost of repairing her, or for a due proportion of that cost. In such a case there could have been no possible claim on the appellants, the underwriters of the freight. Their contract would have been performed. How can the right of the owners to enforce against third persons claims resting on what is in truth a fiction, namely, on the assumption that the ship did not perform her voyage, give them any right against those whose contract was actually performed ? The learned Judges in the Court of Session seem to doubt whether the contract of the underwriters on the freight was performed ; whether the sum paid to the owners by the consignees, on delivery of the cargo at Liverpool, could be treated as freight ; whether it was not rather to be regarded as in the nature of salvage, paid indeed to the owners, but paid to them only as agents of the underwriters on the ship. I do not, however, think there is any ground for such a doubt. The sum paid to the owners by the consignees was due for freight, and for nothing else ; and if payment had been withheld, there can be no doubt but that an action could have been maintained by the owners for freight immediately on delivery of the cargo. None but the owners could have maintained such an action, and they could maintain it only by virtue of their original contract of affreightment. What the underwriters on the freight undertook was, that the voyage should be so performed as that the owners should be able to deliver the cargo, and so be in a condition to assert their title to freight ; and this state of things actually occurred. It is true that the Court of Session first, and afterwards this House, in the action by the underwriters on the ship against the owners, decided that the sums paid for freight were paid to the owners not for their own benefit, but for the use and behoof of the insurers ; and it was strongly contended at your Lordships' bar, that the contract into which the appellants, the underwriters on freight, entered with the owners, was, that the voyage should be so performed as to entitle the owners to recover the freight for their own use, and not merely as agents or trustees for others. The decision in the action by the owners against the insurers of the ship has been, that, under the circumstances, the freight was due not to the former but to the latter, and so it was said the contract of the underwriters on the freight was not performed ; but this reasoning rests on a fallacy. The underwriters on the freight engaged that the ship should not be prevented by perils of the sea from enabling the owners to earn her freight. Nor was she so prevented ; for in spite of those perils, she arrived in port under the conduct of the owners, and obtained payment of her freight. The right of the underwriters to claim that freight against the owners arose not from perils of the sea, but from the election made by the owners after the

freight had been earned and paid them, to treat the ship as wholly lost on or before 11th August. Where a ship has received such an injury as entitles the owner to treat it as totally lost, and the owner consequently abandons it to the underwriters, they, if they repair and navigate her, come in as assignees, and so are entitled to all freight afterwards earned. In such a case the owner has been compelled by perils of the sea to abandon the ship, and so he loses not only the ship, but all possibility of earning freight. Here, though according to the verdict the ship was totally lost, yet there was no abandonment till after she had arrived in port, and till the owners were in a condition to insist on payment of the freight, and until that freight had been paid to them. In such a state of things, I concur in what was said by Mr Baron Alderson, when he delivered in this House the opinion of the Judges in *Benson v. Chapman*, 2 H. of L. C., 721,—“Nor, indeed, is there any instance to be found in which an action for a total loss of freight has been held to be maintainable, where the freight has been actually earned.” The Court below seems to me to have fallen into an error by overlooking this distinction. Whatever might be the rights of the owners as between themselves and the insurers of the ship, it could not possibly be competent to them after the freight had been earned, to make an election which should affect the interests of third persons. On the ground, therefore, that here the freight insured was actually earned and received by the owners, and that but for their act, after such earning and receipt, they might have retained it for their own use, so that the contract into which the appellants entered was strictly performed, I have come to the conclusion that the judgment below was erroneous, and I, therefore, move your Lordships that it be reversed.

LORD TRURO. My Lords, I concur in the conclusion to which my noble and learned friend has arrived,—that the judgment which was pronounced in the Court below is erroneous, and ought to be reversed. The question now before your Lordships is, whether, because the underwriters upon the ship were entitled to the amount of freight, that in point of law constitutes a total loss of freight within the meaning of the policy. I own it appears to me that the assured's right of abandonment and recovery of a total loss against the underwriters upon the ship has been determined under circumstances somewhat peculiar. The ship actually performed the voyage, a circumstance which, as far as I am aware, has never occurred where the owner has been held entitled to abandon the ship and claim for a total loss, however extensive the damage may have been which was incurred during the voyage. In the cases in which abandonment has hitherto been allowed, the voyage has either been actually lost, or the ship has been placed in circumstances by the perils insured against, in which no prudent owner uninsured would do that which has become necessary to enable the ship to perform the voyage. That the underwriters of the ship were liable to indemnify the owner for the pecuniary damages which he would sustain by the outlay necessary to repair the injuries which the ship had received, is quite clear; but the decision by which the right to abandon and recover a total loss was established appears to me to be somewhat in advance of the previous decisions. The case the nearest in point of circumstances, and which was referred to by my Lord Cottenham in moving the judgment of the House, is that of *Samuel v. Royal Exchange Assurance*

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Company, 8 B. and Cr. 119. It does not appear to me, that, provided the loss occurs during a voyage, it is at all material whether that loss happens a short time after the inception of the risk, or a short time before the voyage is completed. From the commencement to the termination of the risk the effect of the loss is the same, inasmuch as the loss during any portion of that interval is equally a loss at whatever time it may occur during the voyage. In the action against the underwriters on this ship, the jury found facts which must be coupled with facts admitted upon the record. This, I think, has been much overlooked, it being a clear principle of law that that which the parties admit upon the face of the record the jury even cannot gainsay. It is not within the issue left to them. Their verdict therefore must always be construed with reference to the facts admitted upon the face of the record. The verdict in this case, taking it in its terms, coupled with the facts admitted upon the record, shows that the ship, although so damaged as not to be worth repairing, had yet performed her voyage. In order to determine whether those facts constitute a loss of freight within the meaning of the policy on freight, it is necessary to consider what are the obligations which the underwriter takes upon himself by that policy. I conceive that the underwriter upon the freight binds himself to indemnify the assured against any loss of freight occasioned by the ship being prevented from performing the voyage insured, by any of the perils mentioned in the policy, and thereby the freight insured being earned. I understand his liability to indemnify against the loss of freight is limited to a loss occasioned by the ship's being prevented from performing the voyage insured, by any of the perils within the policy. With a loss of freight sustained from any other cause, or by any other means than the incapacity of the ship to perform the voyage and earn the freight, I do not understand the underwriter is at all concerned. No case has been cited, and I believe none can be cited, inconsistent with that doctrine. Now, if the true construction of the policy, or, in other words, the obligation of the underwriters upon the freight, be what I have stated, the facts of this case appear to be conclusive against the claim of the respondent. The expression "the loss of freight" has two meanings, and the distinction between them and its effects it is material to bear in mind. Freight may be lost in the sense that by reason of the perils insured against, the ship has been prevented earning freight; that is the sense in which it has been lost in this case. Or you may use the expression "loss of freight" in the sense that it may be lost to the owner, after it has been earned, by some circumstances unconnected with the contract between the assured and the underwriters on the freight. For a loss of freight in the first sense, that is, the ship being prevented earning the freight by the non-performance of the voyage insured, the underwriter on the freight is liable. But for any loss of freight sustained by the owner after it has been earned, I conceive the underwriter is not liable. I can extract no obligation whatever from the policy which should subject him to such a loss. He has performed his warranty by the freight being earned, and he has no concern whatever with who may be entitled to the freight when so earned. In this case, at the time the owner received the freight, he so received it on his own account for his own benefit, and, as the facts then stood, was entitled to retain it against all the world. The contract between the owner

and the underwriters on freight had been entirely performed, and the relation Mar. 3. 1858.
between them determined, and the assured was at that time entitled not only to retain the freight but to recover a full compensation for any pecuniary loss he might have incurred by reason of the damage which his ship had sustained. Scot. Marine Insurance Co. v. Turner, &c.
But having valued his ship at the sum of £7500 and the cost of the necessary repairs of the damage being £4000 only, he preferred to claim a total loss and to abandon his ship, and thereby obtain £7500 rather than to claim a partial loss, by which he would be entitled to recover only his actual damage of £4000, retaining at the same time his ship; and the consequence of his electing to take that course was to make the freight which he had received for his own benefit an item in account between him and the underwriters of the ship; and upon that he founds a claim to a total loss of freight against the now appellants. The act of abandonment, if it did not operate as an assignment of the ship, at least enured as a binding agreement to assign it, and thereby invested the underwriter on the ship with all the rights which belonged to him as owner, among which rights it is said was that of having the benefit of the earnings of the ship during the voyage—the assignment by abandonment, as I call it, being supposed to entitle the underwriter to all the profits which had arisen throughout the voyage. If the ship had been uninsured, this question could never have arisen. But it is said that although, if the owner had stood his own insurer, there would have been no loss, yet, by reason of his having thought fit to make a contract of insurance with others, and afterwards to constitute those insurers owners of the ship in his place, the underwriters on the freight have been guilty of a breach of their contract by not indemnifying him for what he calls a loss of freight, arising out of his having invested the underwriter of the ship with his title to the freight actually earned. I think such a claim is not founded in law or in justice. If uninsured, there could have been no pretence of loss; but if insured, the amount of claim against the underwriter of the freight is, according to the argument of the respondent, to vary according to the proportion in which the assured happens to have insured the ship. Look at the form of the policy in question, which is, that the insurance is to last until ten days after the report of the Custom House of the ship. So that the ship having arrived and delivered her cargo, the freight earned and paid, if the ship sinks within the time of the insurance of the ship—that sinking resulting from the perils which had been incurred before—the underwriter is to be answerable for the loss of freight because the ship had been lost after the freight had been earned. My Lords, his premium is not measured by any such degree of risk. It is not within the terms of his contract—it is not within the spirit of his contract—and I think not within the terms of the policy. The title of the underwriter on the ship to the freight was not founded upon the policy, or upon the extent of the damage which the ship had sustained, but upon the election of the assured to abandon, that is, to assign his ship to such underwriter; and a doctrine which leads to this, that an arrangement between the assured and the underwriter upon the ship will render an underwriter upon the freight liable to pay a total loss upon the freight, in relief of the underwriter upon the ship, and that in a case where the freight has been actually earned and received—I say such a doctrine as that should be watched with great jealousy. Wherever a ship is so circum-

Mar. 3. 1853. *stanced as that the assured has an election to treat it either as a total loss or a partial loss, I conceive abandonment is a condition to be performed either prior to or contemporaneously with his claim of total loss. And I can see no just ground for doubting that this was at least a case of election, assuming, as I have before stated, that such an election exists after the voyage has been actually performed. In illustration of the effect of a policy on the freight, the case of *Everth v. Smith*, 2 M. and S. 278, may be referred to, by which it was decided that such a policy was not an insurance on specific freight, but on the freight generally, and that if any freight was brought home no loss would happen for which the underwriter was liable. *Macarthy v. Abel*, 5 East, 388, seems to me directly in point, and was referred to and adopted in *Everth v. Smith*. That appears to me to be a distinct authority upon the present case, and although the attention of the learned counsel at the bar was called to the case, undoubtedly it has received no answer. Nothing has been said to impugn the doctrine there laid down, nor any distinction pointed out with reference to its just application to the present case. The case has been argued with great learning and ability by the judicial authorities in Scotland; and ample justice has been done to the case by very able and learned arguments at the bar, but I feel bound to state, with every respect to a contrary opinion, that it is clear to my mind, that there has been no loss of freight in this case within the meaning of the policy. I therefore concur in the opinion, that your Lordships are bound, in point of law, to reverse the judgment of the Court below.*

Judgment reversed.

W. H. Cotterill, Solicitor, London, } Agents for Appellants.
James F. Wilkie, S.S.C., Edinburgh, }
James Turner, Westminster, Agent for Respondents.

No. 7.

COLLINS AND FEELY v. YOUNG.

Partnership—Judicial Factor.—The Court will not appoint a judicial factor to wind up the affairs of a dissolved partnership on the application of the representatives of a deceased partner, without proof of fraud, or at least of unreasonable delay, on the part of the surviving partner in winding up the concern.

Mar. 14. 1853. *The interlocutor appealed against in this case, was one pronounced by the Second Division of the Court of Session on 17th February 1852, appointing, at the instance of the respondent, a "judicial factor on the estates of the dissolved company of Daniel Collins, Alexander Young, and Peter Feely, for winding up the affairs of that company." (See ante, vol. i., p. 476, for the facts of this case.)*

*Collins and
Feely v.
Young.*

The *Solicitor-General*, (*Bethell*), and *Anderson*, Q.C., for the appellants. Although the death of a partner may dissolve the company so far as his interest is concerned in regard to future transactions, it still subsists for the purpose of winding up the affairs, and completing the engagements which had been entered into prior to his death. This is a matter which both by Scotch and English law is confided, in all, save extraordinary cases, to the surviving partners; 2 Bell Com. 645; *Hardie v. Glover*, 18 Vesey 281; *Maxtone v. Muir*, 9th July 1845, 7 D. 1006. It is only where all the partners are dead that the Court interferes by the appointment of a judicial factor, or receiver,

on the ground that the confidence which subsisted in a partner, so long as ^{Mar. 14. 1853.} any one survived, does not subsist between the representatives; *Philips v. Atkinson*, 2 Br. Chanc. Cas. 272; *Dixon v. Dixon*, 6 W. and S. Appeals 229. There are no circumstances proved in the present case to take it out of ^{Collins and Feely v. Young.} the ordinary rule. The averments of the original petition were expressly denied by the appellants, and no proof of them was offered. The interest of the appellants in the sum to be recovered being two-thirds, besides their additional charges for personal superintendence, they have obviously an abundant inducement to push forward the settlement of the claim with all speed. A judicial factor could do no more, and would only make a further charge upon the estate. The appellants are perfectly solvent. If any fear of this is entertained by the respondent, he has the ordinary remedy of an action of count and reckoning against them, upon the dependence of which he may arrest in the hands of the railway company, and so force them judicially, or extra-judicially to make payment directly to him.

The *Lord Advocate*, and *James*, for the respondent. The partnership was brought to an end by the death of Young in January 1851. All the work on the contracts having been finished before that time, the assets ought to have been immediately realised, and divided amongst the parties who had right to them. That this has not been done after the elapse of a whole year, is in itself delay sufficient to warrant the interference of the Court in the manner granted; 2 Bell Com. 638. If any progress had been made, some proof of it ought to have been offered. But neither the balanced books, nor any obstacles have been produced, either to the respondent or to the Court. The application would in these circumstances, have been justifiable even if this had been an ordinary case of contract of copartnery. But it is not. Here Collins acted for the partnership in virtue of an express mandate, instead of in virtue, as in the ordinary case, of the legal right of a partner to bind his fellow-partner by his acts. This mandate fell by Young's death. As therefore it superseded the ordinary rights of Collins as a partner, he has none now on which to act in recovering the monies due to the late partnership. It was therefore absolutely necessary for the Court to step in and supply the authority which no one else had now power to grant. An action of count and reckoning could not have availed for this.

The LORD CHANCELLOR, after reciting the facts. I confess, with all respect for the very learned persons who constitute the majority of the Court of Session, I have come to the conclusion, and I am bound so to state it to your Lordships, that I think the reasoning of the learned Judge who took the contrary view, is the correct view in this case. Three persons entered into a contract, it was not strictly a partnership, but it was very candidly admitted by the respondent's counsel, that the contract must be dealt with in this winding up as if it were a partnership. What is the law of Scotland with regard to the surviving partners in a mercantile contract? I take it to be exactly the same as the law of England, and as it is stated in the very learned judgment of Lord Cockburn in this case. That being so, the contracts having been now completed, and there remaining nothing to do but to wind up the concern, that is, to collect the £1500, or whatever may be the sum remaining due from the railway company, why are the two remaining partners not to exercise their

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right of winding up the concern, and getting in the assets? Two grounds have been alleged for calling on the Court to interfere, and prevent them from exercising that right. The one is, that whatever be the ordinary right, it is said in this case the right is specially limited by the terms of the contract, by the stipulation that Collins should receive the money due under the contracts in virtue of a special mandate granted him to that effect by the other partners—which mandate, it is said, fell by the death of Young. What then? I suppose it is so. Undoubtedly the result of that is, that Collins can no longer receive by virtue of that mandate. But all that follows is, that the parties are remitted to the same rights that they would have had if there had been no such mandate—that Collins and his partner are the parties entitled to receive the money as if no such mandate had ever existed. Any other construction of the contract would be a very strange one, and one which cannot be successfully contended for. Then the other ground is this, that there has been here such unwarrantable delay that the Court is called upon to interfere with the surviving and legal winder up. If there be nothing suggested but delay—if the delay be unconscionable and unreasonable—that might be, I think, a very proper ground; but unless it is very clearly made out, one would be very loth to believe that in point of fact there can have been unnecessary delay, in a case where the monies to be got in belonged as to two-thirds to the parties who are endeavouring to get them in, and who have had every interest to act with the greatest possible diligence. They might however have neglected their duty, and if they had neglected their duty, the Court might have been justified in acting on the delay so established. But what are the facts? It is said in the petition, unsupported by any evidence, that there has been delay. This is totally denied in the answer, and in the answer the circumstances are set forth, which shew why the money has not yet been got in—it not being a specified sum, but being to be ascertained by a third party over whom the parties have no power. With all due deference to the learned Judges, it seems to me they have acted on the assumption that all the facts stated in the petition were true, and all those stated in the answer were untrue. But no proof was adduced of the one more than the other,—there is simply assertion and denial. How then can you say that delay is established? It appears to me that this ground fails as well as the other,—and I shall consequently feel it my duty to move your Lordships that this interlocutor be reversed.

LORD BROUGHAM. My Lords, I entirely agree with the judgment which my learned friend has so satisfactorily pronounced. But as the judicial factor has already gone in, it would be the interest of both parties that whatever he has done should stand,—and the interlocutor be so framed that the parties may go on,—because as the matter stands, the consequence would be, that everything *ab initio*, would be upset.

Solicitor-General. That has been provided for by a subsequent interlocutor permitting the judicial factor to proceed, the respondent being ordered to answer whatever should be done by the judicial factor in the meantime, in the event of the interlocutor being reversed, and to restore matters to their former state.

LORD BROUGHAM. Then we simply reverse the interlocutor.

Solicitor-General. The petition being utterly irrelevant, your Lordships will kindly give us the expenses of the petition, not of this appeal. Mar. 14. 1853.

Lord Advocate. That is not the usual course. The usual course is this, when the interlocutor is reversed, the case goes back to the Court of Session, who deal with the question of costs. Collins and Feely v. Young.

LORD BROUGHAM. No,—we give the expenses of the refusal.

LORD CHANCELLOR. We must so declare. Reverse the interlocutor, declare the petition ought to have been dismissed with costs, and remit it back to the Court of Session.

Judgment accordingly.

Robertson and Simson, Westminster, Agents for Appellants.

Richardson, Loch and Maclaurin, Westminster,
James Gordon, W.S., Edinburgh, } Agents for Respondent.

THE PARLIAMENTARY TRUSTEES OF THE RIVER CLYDE AND HARBOUR OF GLASGOW *v.* DUNCAN AND COCHRANE. No. 8.

Principal and Agent—Implied Authority—Bill of Exchange—Minor.—Possession of a promissory note belonging to a minor by his factor, who was accustomed and empowered to receive the interest upon it, held, not sufficient to authorise payment of the principal to the factor.

John Morison Duncan, the respondent (pursuer in the Court below), was at the date of the circumstances which led to this action, a minor. Cochrane was his uncle and his curator, but he resided constantly in Liverpool, whilst Duncan himself resided chiefly in Glasgow in the house of Andrew J. Duncan, also his uncle, and who acted as factor for him. In that character he drew the rents and interests of the respondent's property, and made all the necessary disbursements for his education and maintenance. Mar. 17. 1853.

In 1843, an heritable bond for L.2000 due to the respondent was paid up. The money was paid to Andrew J. Duncan, but the deed of discharge was signed, at the requisition of the payer's agents, not by him but by the respondent and his curator. This was at Martinmas. On 21st November, Andrew J. Duncan, who had previously intimated to Cochrane that he was looking out for a new investment for the money, offered to the Clyde Trustees to lend it to them, "on a bill to be granted by them; the interest to be at 4 per cent., and to rise according to the rate of the money market. The bill to be granted in favour of William Cochrane, Esq., as curator for John Morison Duncan." The loan was accepted, and a bill granted in the following terms:—"One day after date, we, two of the Parliamentary Trustees of the River Clyde and Harbour of Glasgow, and the Secretary of the Trust, promise to pay to Mr William Cochrane, as curator for John Morison Duncan, the sum of L.2000 sterling, value received in money borrowed of him for the purposes of the Clyde Navigation Trust. Subscribed by us at a meeting of the Clyde Trustees, at Glasgow, the 5th day of December 1843 years.—James Lumsden, Chairman; Charles Gray, Deputy-Chairman; A. Turner, Secretary."

It did not appear that this transaction was prior to its completion intimated to Cochrane. But on 9th January 1844, Andrew J. Duncan wrote to Cochrane, referring to a previous letter informing him of the loan, stating that it was a good security; but that, although the bill was granted at one day's

Mar. 17. 1853. *Clyde Trustees v. Duncan and Cochrane.* date, the Trustees require a three months' premonition before calling it up, and enclosing a letter for him to sign consenting to this arrangement. Cochrane in answer stated, that Andrew J. Duncan had not previously informed him to whom the money had been lent, but that he thought he had chosen a very good security. He returned signed the back letter required by the Trustees. Andrew J. Duncan thereafter drew the interest on this loan, granting receipts for it in his own name as factor, and having possession of the bill along with the other documents and title-deeds belonging to the minor. In August 1845 he addressed a letter to the treasurer of the Clyde Trustees, stating that it was wished to call up L.500 of the money, and that he should feel obliged if it could be paid within a fortnight. The Trustees agreed, and the money was paid him, a receipt being granted by him "for J. M. Duncan's Trs." and the same being noted on the back of the bill. On 14th November of the same year, he again applied to the Trustees to pay up the remainder, requesting them to dispense with the three months' intimation required by the back letter. The Trustees again acceded, and on the 21st the money was paid, and the bill given up to the Trustees, with a blank indorsation, by Andrew J. Duncan.

The respondents averred that these transactions took place without their consent or knowledge. Accounts-current were rendered regularly by Andrew J. Duncan up to the end of 1843. It was denied that any had been rendered subsequently. In the ledgers of Andrew J. Duncan, of subsequent date, the sums withdrawn from investment with the Clyde Trustees were regularly entered, as well as the subsequent investments which had been made with the money. These were, for the most part, in railway shares, and resulted in heavy loss. In 1846 the respondent Duncan came of age. It was alleged by him that he made repeated applications to Andrew J. Duncan for his accounts, but in vain. The latter still continued to act as factor, and down to the end of 1847 was in communication with Cochrane in that character. Early in 1848 his affairs became embarrassed, and his property was attached by the Crown. In April 1848 Messrs Horne and Rose, W.S., addressed, on the part of the respondents, a letter to the Clyde Trustees applying for payment of the L.2000. It was refused, and an action was raised for the amount, with interest. The Lord Ordinary (Wood) decerned for the pursuers, except so far as it should be instructed that the money uplifted by Andrew J. Duncan had been accounted for to the pursuers. The Second Division of the Court unanimously adhered. Against this decision the present appeal was brought.

Solicitor-General (Bethell), and Sir Fitzroy Kelly, for the appellants. Andrew J. Duncan was all along the agent of the respondents, with unlimited powers to transact all their business. It is proved by the letters in process that he uplifted and invested money for them at his own discretion. At any rate, his books shew distinctly the uplifting of the sum now in question, and as he had rendered accounts regularly down to 1843, the presumption is that he continued to do so, and so the respondents homologated his acts. [The LORD CHANCELLOR. The presumption is the other way. It is denied that he rendered such accounts, and it therefore lies on you to prove your assertion that he did.] The respondent Cochrane was a man of business, so was

Andrew J. Duncan, and the presumption is, that they acted in a business-like manner. But apart from specialties, the mere possession of a bill by an agent is always sufficient authority for him to receive payment of it; *Whitlock v. Waltham*, 1 Salkeld 157; *Owen v. Barrow*, 1 Bos. and Pull., 103. These were cases of bonds; a bill is stronger, being a document of which the essence is, that the property is transferred by mere delivery. The law of Scotland would be undoubtedly the same; *Paterson*, M. 11,604. The Clyde Trustees, therefore, having dealt all along with Andrew J. Duncan, having received from him the money, paid him the interest, and known that the bill was always in his hands, were entitled to pay it on his demand to that effect—and its redelivery by him is a valid discharge to them. Mar. 17. 1853.
Clyde Trustees v. Duncan and Cochrane.

The *Lord Advocate*, and *Rolt*, Q.C., (with whom *Gregg*, and *Boyd Kinneir*), for the respondents. This is not the case of an ordinary mercantile bill. It was in fact a bond for money lent, and was never intended to be a negotiable document. It could not be negotiated, for it is expressly restricted on its face, being made payable to a curator for a minor. It could not, therefore, be safely paid without care being taken that the money should reach the true creditor; *Sigourney v. Lloyd*, 8 B. and C., 622; *Feuttl v. Barandon*, 8 Taunt., 100. Mere possession of a document of debt is not authority to uplift the debt. *Whitlock's* case lays down what is not law now. [LORD CHANCELLOR, not as an unrestricted rule]. The case of *Owen* is one where an agent in a law suit was held, in the absence of contrary evidence, to be agent for his client. The case of *Morison* was one of a wife, who always has authority to bind her husband in small matters. A power to draw interest does not infer a power to draw principal, or to deal with it otherwise; *Kirkman*, M. 8977; *Hoy v. Snaith*, 1 Taunt., 349. Andrew J. Duncan had authority to draw the interest, but that was as agent, and not as holder of the bill. The bill was simply left in his custody along with the other documents of his client. The Clyde Trustees had at the first known he was only agent, and had taken the back letter not from him, but directly from his principals. Nothing subsequently took place to entitle them to deal with him as if he were himself the principal.

The LORD CHANCELLOR. In this case the curator lived at Liverpool—the minor and the factor at Glasgow,—and therefore the management of the Scottish property came to be devolved almost entirely on the factor. He appears to have made the investment with the Clyde Trustees without communication with the curator, and under his general authority. Cochrane ultimately approved of it, after stating, but not pressing, an objection to the form. The question now is, the money being lost, which of two innocent parties is to bear the loss? I am clearly of opinion that it must be the Clyde Trustees, and that the Judges of the Court below were right in so deciding. The case has been very much argued on English law. Even in that view it cannot be held that the mere redelivery of such a note as this by the agent, in whose hands it was, would be a good discharge. The case in *Salkeld* may be quite right in particular circumstances, but it would be going too far to say that the conclusion deduced from it is now, under all circumstances, sound law. The bond there was left in the hands of a scrivener, a profession to which there is now nothing parallel, as it combined the functions of broker, banker, and

Mar. 17. 1853. agent. But though we should assume the law to be as it is there laid down, this case is entirely different. There there were no third parties interested—here there were, and that expressly so on the face of the note. In fact, although this is called a promissory note, it is not at all similar to an ordinary commercial note, for this note could not have been negotiated. I think, therefore, the Judges in the Court below were perfectly right, and I entirely agree with the views expressed by Lord Ivory in deciding the case. I am confirmed the more in my opinion of the non-validity of a discharge by others than the principals, in such a case as this, by the practice disclosed in the discharge of the heritable bond in which this money was invested prior to its investment with the Clyde Trustees, for in that case the discharge of the agent was not accepted, but that of the principals was demanded. Had the Clyde Trustees acted with similar caution, they would not now have had to undergo this loss.

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Appeal dismissed, and interlocutors appealed from affirmed with costs.

Richardson, Loch, & Maclaurin,	} Agents for Appellants.
Simon Campbell, S.S.C., Edinburgh,	
Law, Holmes, Anton, & Turnbull,	} Agents for Respondents.
Horne & Rose, W.S., Edinburgh,	

No. 9.

MILLAR v. SMALL.

Ground-Annual—Personal Obligation.—The obligation to pay a ground-annual is a personal one, from which the party who has originally become bound to pay it cannot divest himself by any transference of the property in respect of which it is due, without the consent of the party to whom it is payable. *Over-ruling the case of Peddie v. Soot's Trustees*, 27th Feb. 1846.

Mar. 17. 1853. In 1835 the trustees for the Dundee and Union Whale Fishing Co. conveyed certain subjects in Dundee to the respondent, "and his heirs and assignees whomsoever," but "under the real burden of a ground-annual of L.273 sterling, payable, the said ground-annual, by the said James Small, junior, his heirs, executors, and successors," to the said trustees. The disposition further stipulated that such "annual payment or ground-annual, interest thereof, and liquidate penalty, and the whole conditions and declarations relative to the said ground-annual, interest and penalty, are hereby declared to be real and preferable burdens over and on the said subjects hereby disposed." And it was further declared that this condition was to be engrossed in all future conveyances, transmissions, and investitures of the subjects, and that any such conveyances, &c., in which ground-annual and conditions should not be engrossed at length as real burdens, should be *ipso facto* void and null. The deed contained the ordinary feudal clauses of warrandice, re-entry, procuratory of resignation, &c. It then proceeded, "For which causes, and on the other part, the said James Small, junior, binds and obliges himself, his heirs, executors, and successors whomsoever, to make payment to" the said trustees "of the said sum of L.273 sterling, in name of ground-annual for the said subjects, and that yearly, at the terms of Whitsunday and Martinmas in each year." Then followed an obligation by certain parties, "conjunctly and severally, and their respective heirs, executors,

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and successors, as cautioners, sureties, and full debtors for and with the said James Small, junior, and his heirs, executors, and successors whomsoever, to make payment" to the said trustees of the said ground-annual, &c., "and that aye and while the said James Small shall not have erected permanent buildings on the said subjects to the value of at least L.1500 sterling." Upon which event it was declared the cautionary obligation above written should cease. But James Small further bound himself, "and his heirs, executors, and successors, at any time hereafter, when the value of the building to be erected on the said subjects shall fall below the said sum of L.1500, to find new security to the satisfaction" of the said trustees, for the regular payment of the said ground-annual, &c., "aye and while the buildings on the said subjects shall be below the value of L.1500."

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Previous to the date of this deed, the respondent had agreed to transfer the subjects to be acquired under it to Thomas Adamson. Of even date with the disposition by the trustees of the fishing company, there was therefore executed a disposition and assignation by Small to Adamson of the said subjects, and of the deed of conveyance by the fishing company trustees, with its unexecuted procuratory of resignation. The real burden of the ground-annual was duly engrossed in this deed. Adamson bound himself to make due payment of it to the fishing company trustees, "and further to warrant free and relieve, harmless and skaithless keep the said James Small and his forebears, of the whole obligations incumbent on him by the said contract entered into between him and the said" fishing company trustees, "and ground-annual, &c. therein contained, and of all cost, damage or expense that he or his forebears may happen to sustain or incur in any manner of way connected therewith," and that either by paying to the trustees the ground-annual, or by paying it to Small, together with all expenses incurred, in order that he might pay it to the trustees. There then followed a cautionary obligation by the same parties, as in the original deed, to free and relieve Small of and from payment of the said ground-annual, in terms precisely similar to those by which they were bound in the former deed. And, in like manner, Adamson bound himself to find new security so soon as the buildings on the ground should fall below the value of L.1500.

The term of entry under both deeds was Martinmas 1835, and at that date Adamson took possession of the subjects. The conveyance to him was immediately intimated to the fishing company, and he duly paid the ground-annuals till his bankruptcy in 1842. In 1836 the fishing company executed an assignation of their right to the ground-annual to Millar the appellant, narrating in the deed the conveyance to Small, and the conveyance by him to Adamson, under the real burden of the ground-annual, &c., aforesaid.

On Adamson's bankruptcy, Millar raised and obtained decree in an action of poiding the ground against him, for payment of the ground-annual. He also charged the respondent for payment of the same ground-annual. The respondent suspended on several grounds, only one of which came to be decided in the present appeal. On 9th Dec. 1846 the Lord Ordinary (Wood), decerned in his favour, founding his decision on the case of *Soot's Trustees*, 27th Feb. 1846. On advising a reclaiming note, the First Division ordered

Mar. 17. 1853. minutes of debate, and on 2d Feb. 1849, unanimously adhered. Against this interlocutor the present appeal was brought.

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Solicitor-General (Bethell), and *Anderson, Q.C.*, for appellant. The decision appealed from is founded on that of *Soot's Trustees*, but that has not been affirmed by this House. It related to a contract utterly unknown to the institutional writers of Scotland, and to the common law of Scotland, and was arrived at by pursuing a fancied analogy betwixt a ground-annual and a feu-duty. But its true nature has been long well understood in England, and in that country it is held to be a personal obligation, from which the debtor can never relieve himself by transferring it to any other without the creditor's consent. That view is in express accordance with the true construction of the deed now in question, by which the disponent bound himself personally, his heirs and successors, to pay the ground-annual. It cannot be said that "successors" in this question can be interpreted "singular successors;" *Thomson*, 22d May 1810, F. C.; *Maclachlan*, 14th May 1823, 2 S. 303. Even in the case of a feu or a lease, the consent of the superior or landlord is necessary before the disponent or tenant can liberate himself from his obligation by assigning his right to another; *Wallace*, M. 4195; *Skene*, 20th May 1825, 4. S. 26. In the present case neither the fishing company nor Millar ever gave such consent, but on the contrary, they granted receipts for the ground-annuals, as paid by Adamson for Small. Supposing, however, the case of *Soot's Trustees* to be good law, there are here two important specialties. Firstly, No infeftment was taken either by Small or Adamson; their rights therefore never having been made real must be treated as personal to all effects. Secondly, That cautioners were taken bound for the payment of the ground-annual in addition to the obligation of the principal. Their obligation has never been loosened, but it cannot be held that whilst they remain bound the principal is to go free.

Rolt, Q.C., and *Hamilton Pyper*, for the respondent. The personal obligation here is not a substantive and independent one, but merely accessory, and, as such, must pass with that which was the principal, i.e., the ground itself. It was only intended to make the recovery of the ground-annual the more easy, by giving recourse against the actual possessor of the ground for the time being. Without any express obligation, any future possessor of the ground would be personally liable, and it would be absurd to hold that two distinct persons could thus be liable for an obligation for which the obligor had only once stipulated. Neither did the circumstance of the added cautionary obligation affect the case. That obligation would have passed with its principal, even if it had not been expressly transferred. The terms of the receipts were merely descriptive of the subjects, and inferred no refusal to accept Adamson in Small's place.

The LORD CHANCELLOR, after reciting the clauses of the deeds above referred to. The ground of argument on behalf of the respondent, under these circumstances is, that the obligation undertaken by him to pay the ground-annual ceased on the transference by him of the property, in respect of which it was to be paid to Adamson. And this is supported by the decision in the case of *Soot's Trustees*, by which it is said that the doctrine was established,

that in the case of a ground-annual the personal obligation is merely accessory, and passes with the property itself. On the other hand it was contended that this case is distinguishable from *Soot's* on two grounds; in the first place, that here infetment never has been taken; and, in the second place, that the obligation here was not a sole one, but that cautioners also were parties. I do not think that either of these points can found a valid distinction betwixt the two cases; but this is of the less importance, because I have come to a clear conclusion that the decision of the Court below in *Soot's* case was erroneous, and that in consequence the judgment now under review must be reversed. The nature of the point here to be decided is correctly stated in the opinion of Lord Wood in the case of *Soot*—but I differ from that learned Judge entirely in the conclusion to which he comes upon it. The question is one of construction of the deed by which the right was created, and I can see no evidence of intention in that deed that Small should have the right at his pleasure of conveying away the property, and annulling at the same time the personal obligation under which he had come to the sellers. On the contrary, the true construction of the deed inevitably brings us to the conclusion that he entered thereby into an obligation, from which, whatever he might do with the land, he could never divest himself without the direct consent of those in whose behalf it was created. And this view is supported by the fact that undoubtedly the cautioners were bound whatever he himself might do. But the words by which they are bound are the very same as those by which he was taken bound, and it cannot be said that the same words are in the same case to have a different construction as applied to the principal and as applied to the sureties. The Court below were bound by the rule laid down in *Soot's* case, but that is not binding upon us, and I therefore move your Lordships that the interlocutor now before us be reversed.

LORD ST LEONARDS. Although I agree with my noble and learned friend in the judgment he has now pronounced, and also in his opinion in regard to the rule in *Soot's* case, yet I differ from him as to the non-materiality of the stipulation of the cautioners in the present case. For admittedly the cautioners were bound until the period when by the words of the deed they should be liberated, and that whether Small remained or not owner of the land in regard to which their obligation was constituted. And so the Court below came to the very extraordinary conclusion that as Small did not remain bound, the sureties were further bound than the principal. But the law of Scotland as well as the law of every other civilized nation, provides a remedy for sureties as against the individual for whom they become bound, and therefore without very express words to that effect they cannot be bound further than he is, for in that case they would cease to be sureties and would themselves become the principals. So far as intention goes, it is perfectly clear that these parties must have intended that Small should remain liable in relief to them, and if liable he must of necessity have remained liable to the other party to the covenant. This circumstance sufficiently distinguishes the present case from that of *Soot*, and would have been sufficient for its decision though that had been sound. But the principle of that decision cannot stand. A conveyance subject to a ground rent is a mode of setting up an estate, which, till very recently, has been scarcely

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Mar. 17. 1853. known in Scotland. And the Court of Session had this difficulty in construing it in the same manner as it is construed in England, that the law of Scotland has a great objection to a covenant binding a party after the land in respect of which it is established is disposed away, because it is supposed that this would impede the free alienation of property. But a covenant to pay annuity in perpetuity may be made, and the difficulty of carrying it out is no reason for annulling it. It was said that "successors" must mean those who take the property. But this is quite unsound, for successors here are the personal, not the singular, successors. In this country we have frequently cases of covenants with land, in which the assignee indeed becomes bound by taking the land, but in which the assignor, the original possessor, remains also bound after the assignation. In reversing this decision therefore, we do not interfere with any of the established principles of the law of Scotland, a result which no one could more strongly deprecate than myself. But we simply declare that in a covenant of this nature, the Judges in Scotland have erred in importing into it the principles of the feudal law, with which it has nothing to do, and in neglecting the principles of the English law, to which the contract in question is well known, and from which it was imported into Scotland. Neither do we interfere in this way, as it was argued that we should, with the rules of the law of Scotland as regards leases. *Grant v. Lord Braco*, reported in *Kilkerran* (*voce Tack*, No. 2,) decided that a tacksman assigning a lease remains himself bound for the rent. And this is in accordance with the opinions of Bankton and of Erskine. But then it is said that this was overruled by the case of *Skene v. Greenhill*, 4 S. 24, proceeding upon the former case of *Low*, M. 13,873. And in the case of *Skene*, as reported, it is said to have been observed on the bench that the doctrines of Erskine and Bankton were reprobated in the case of *Low*. But that must be an error of the reporter, for they were not in question, far less reprobated in that case. And in the case of *Skene* the landlord had expressly accepted the assignee, and by so doing had expressly liberated the assignor. The case therefore was not the same as that to which Erskine and Bankton refer, and it is by no means necessary to overrule their opinions to come to the judgment which was pronounced in *Skene v. Greenhill*. But here there was no acceptance of the assignee, but on the contrary the ground-annuities paid by him were acknowledged only as paid on account of the assignor. Therefore in discerning that the assignor was not liberated, we neither go against the principle laid down in respect of leases in *Skene v. Greenhill*, nor against that laid down in Erskine and Bankton, which that decision has been erroneously reported as overruling.

Interlocutors reversed, with declaration that the respondent was not released by his assignation to Adamson of his liability to pay the ground-annual in question.

Adam Burn, Doctors Commons,
W. Miller, S.S.C., Edinburgh,
Nicholson & Parker, City,
James Burn, W.S., Edinburgh,

} Agents for Appellant.
 } Agents for Respondent. (J. B. K.)

FRASER v. HILL.

No. 10.

Bill of Exceptions—Partnership.—An exception to the ruling of the presiding judge on a jury trial, that he refused to direct the jury, "that upon the facts proved there was no legal partnership betwixt A. and B," *disallowed*.

Statute—Pawnbroking Acts.—These Acts having enacted that every person who shall carry on the business of a pawnbroker shall have his name legibly painted above the door of the shop:—*Held*, That a contract of partnership for the purpose of carrying on the business of pawnbroking will be null and void if it contain a condition that that requirement of the statute shall not be observed by one of the partners.

The circumstances of this case will be found *ante*, vol i, p. 274.

April 12. 1853.

On advising the bill of exceptions, an interlocutor was pronounced by the Court of Session on 17th January 1852, by which the fourth exception to *Fraser v. Hill*. the ruling of the presiding Judge was allowed, and a new trial granted. Against this interlocutor the present appeal was taken.

The *Solicitor-General* (*Bethell*), and *Bramwell*, Q.C., for the appellants. There was in this case no issue taken as to the validity of the partnership, and it would therefore have been travelling out of his province for the presiding Judge to have given the jury any direction upon it. The existence of a partnership had been established in a previous action, *Fraser v. Hair*, and must therefore be taken as *res judicata* in this. It was indeed taken as a fact in the present case from the beginning. But apart from this, the exception in question is bad in itself. It raises no principle of law, and was not taken to the direction of the learned Judge who presided at the trial on any specified matter of law, but only on the inference as to fact from the facts proved. This inference may arise either because no partnership was proved by the facts, or because the partnership so proved was tainted with an illegality which annulled it. But the exception does not specify to which of these conclusions it points, nor supposing it to be the latter, does it at all indicate the nature of the illegality which vitiated the partnership. The stat. 55 Geo. III., c. 42, sec. 2, permits exceptions of such nature to be taken only to matter of law arising at the trial, and it has been ruled that an exception to be good must state specifically the ground on which it proceeds; and the Court cannot look beyond the ground so stated; *Bain v. Whitehaven and Furness Railway Co.*, 7 Bell Ap. Cas. 90. Further, the exception required the Judge to assume the province of the jury, and say what was the inference from the evidence led before them. He was entitled to tell them what would be the law, in the event of their being satisfied as to the evidence, and he did so direct them. But this exception was because he did not tell them what the import of the evidence was, in addition to what the view of the law would be upon any import which they might find. The learned Judges accordingly who sustained the exception took the case out of the hands of the jury, and first giving a verdict upon the facts, after an examination of the evidence, then proceeded to apply the law to the facts which they themselves had found.

The *Lord Advocate*, *Dean of Faculty*, and *Hodges*, for the respondent. Although no direct issue as to the legality of the partnership was taken, yet the question was clearly involved in the issue. No result of a previous action

April 12. 1858. could be taken as *res judicata* in this, unless it had been betwixt the same parties, which it is not here pretended to have been. The circumstances of *Fraser v. Hill* the partnership necessarily came out in this case at the trial, and if these were such as to prevent it from having the effect in law of a partnership it was the duty of the Judge to tell the jury so. On the whole circumstances it appeared that if Fraser was really intended to be a partner, it was intended that he should be a concealed partner, and such intention has been ruled, under the Pawnbroking Acts, to annul the partnership; *Armstrong v. Armstrong*, 3 My. and K., 64; *Gordon*, 4 Bell's Appeals, 254. This law the fourth exception required the Judge to lay down to the jury, and as it was material to their disposal of the case, his failure to do so was a proper ground for the Court to grant a new trial. In similar cases, a Judge has been held entitled to direct the jury as to the verdict which, on his view of the law, it was proper they should return; *Mitchell v. Williams*, 11 Mees. W., 216.

The counsel for the appellant was not called on to reply.

The LORD CHANCELLOR. My Lords, I am in general very reluctant in deciding cases to have it supposed that I have any wish to cut the matter short, and not to hear all that can be urged as well for as against the judgment of the Court below. But I confess that, in this case, my mind is so thoroughly made up, that it would be nothing but a mere pretence to listen to any further argument on the subject. I have the less difficulty in dealing thus with the case, because it is one of a nature with which, with all due deference to the learned Judges of the Courts of Scotland, they are not so familiar as the Judges of this country; and had they been so, I cannot think the error they have fallen into could possibly have occurred. So far as the subject-matter of this suit is concerned, there can be no doubt, that to carry on the business of a pawnbroker without disclosing the name of all the partners, is an illegal act, and being so, a contract of which this is a condition must be null. Now, this plea was made the defence in the present action; and as it raised the question of fact whether or not that was a condition of the partnership, it was necessary that that question should be determined by a jury. And the first issue raised that question. I doubt whether, under the old forms of procedure in this country, that issue, as framed, could be endured, because it raises a sort of negative pregnant. Whether there is a partnership or not is in a bye-way raised there. But I will assume that that is all got over, and that substantially it raises the question whether the partnership was a legal partnership, and if it was, whether the deed in question was wrongous and fraudulent. At the trial, Fraser called witnesses to depone, that in their understanding he was a partner. At the same time, it appeared that his name did not appear on the license as such, nor over the door. Then the first question the jury had to answer was, Supposing this had not been a pawnbroking concern, does the evidence satisfy you that there was a partnership? If it did not, there was an end of the case, for then no fraud or wrong had been done to Fraser on which he could sue. But if it did, there remained in this case the further question, Are you satisfied that it was part of the agreement that Fraser's name should be concealed? That was a question, the answer to which was to be inferred from all the facts of the case, one of

the most important of them being the non-appearance of Fraser's name on April 12. 1853. the license and over the door. My own opinion is, that these circumstances do lead to the conclusion that such concealment was part of the contract. *Fraser v. Hill*. But there cannot be the least doubt that this was purely a question of fact for the jury. What the Judge should have done, and what I presume he did, was to point out to the jury that these two questions of which I have spoken were those raised in this issue, and left for them to decide. But then he was called on by the counsel for the respondent to tell them, that upon the facts proved there was no legal partnership. If he had done so, I think I may state, without the least fear of contradiction, that upon exception to such ruling it would not have borne argument.

It was argued, and supported by a case cited from Meeson and Welsby that this case was analogous to one which frequently occurs in this country, and in which it has been ruled, that in an action for false imprisonment, or for malicious prosecution, the Judge does right in laying down to the jury as a matter of law, that there was probable ground for the course which had been taken by the prosecutor. But such a case has been from the earliest times admitted solely as an exception to the ordinary rule, for this reason, that it is thought that the question how far a person has been justified in instituting a prosecution is one which is far better left to a Judge than to a jury. But even there the Judge rules only the question of probable cause; the question of maliciousness, which is equally essential, is left to the jury alone. And for the guidance of the Judge in deciding on the probable cause he is entitled to ask from the jury a verdict on any doubtful matter of fact.

Authorities have also been relied upon to shew that an agreement to conceal a partner's name in a pawnbroking business makes the contract illegal and void. No doubt if the Court see upon the face of the contract an agreement of such a nature, it must come to that decision. It needs no authority to support that proposition. But where no written contract exists, the jury must decide whether such agreement was really part of the contract. The cases cited were themselves decided upon that principle, and the exception here being that the Judge did not interpose, and tell the jury that upon the evidence they must decide in a particular way, I think that is most clearly a bad exception, and that the interlocutor allowing it must be reversed.

The Solicitor-General. Will your Lordship give the expenses of the exception in the Court below?

The Lord Advocate. Only of this exception, the others are not yet disposed of.

The Solicitor-General. The others are abandoned. The respondent did not choose to take the judgment of the Court below on the other exceptions, which, if unfavourable to him, he might then have brought up here, but he abandoned them, and allowed the Court to put their judgment on the fourth alone: Therefore they are gone.

Lord Advocate. My learned friend is entirely wrong in that. The other exceptions were not abandoned; the Court chose to put their judgment on this one, but there has been no judgment at all on the others, and I apprehend that we are still quite entitled to maintain those exceptions.

LORD CHANCELLOR. This case must follow the same rule as the other cases.

April 12. 1853. The *Lord Advocate* and *Solicitor-General* ultimately agreed on the judgment being in the following form :—
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“Ordered and adjudged that the said interlocutor in so far as it “allows the fourth exception, sets aside the verdict in the cause, and grants a new trial, reserving all questions of expenses,” be, and the same is hereby reversed : And it is further ordered that the cause be, and the same is hereby remitted back to the Court of Session, with instructions to disallow the said fourth exception, and to find the respondent (defender) liable in the expenses incurred in the said Court of Session, in respect of the said fourth exception : And it is further ordered that the said Court of Session do proceed further in the said cause as shall be just and consistent with this judgment.”

Robertson & Simson, Westminster, } Agents for Appellant.
Thomas Dunn, S.S.C., Edinburgh, }
Deans & Rogers, Westminster, } Agents for Respondent. (J. B. K.)
C. & C. Fisher, S.S.C., Edinburgh, }

No. 11.

WISHART v. WYLIE. (TWO APPEALS.)

March—Running Stream.—Where a running stream is the march betwixt two properties, the *solum* is not common, but is the property as to each side, and *usque ad medium aque* of the proprietor of the land on that side.

Statutes 59 *Geo. III.*, c. 85, § 14, and 6 *Geo. IV.*, c. 120, § 40.—*Quære*, Whether in a case in which proof has been taken in the Sheriff Court, if the Court of Session under the former of these statutes orders further evidence to be taken, it is competent on appeal to the House of Lords to discuss such further evidence, or whether the provision of the second statute extends also to this case.

Proof.—But a remit to a surveyor to prepare a plan shewing the ground in dispute, and the several claims of the parties is not of the nature of an order for further proof.

Costs.—Circumstances of obscurity in an interlocutor of the Court of Session inducing the House to refuse to give costs against the appellant, though unsuccessful in his appeal.

Action of Relief—Petition—Conjunction of Actions.—In an action commenced by petition, *Held* that the defender is entitled to call parties against whom, if himself found liable, he has a claim of relief, by petition also ; and that the two actions may thereupon be properly conjoined.

Advocation.—An objection by the pursuer to such a course would fall under the head of an objection to “competency” under the 50 *Geo. III.*, c. 112, § 36, and so entitle him to advocate—but if he does not advocate thereon he cannot state the objection in any advocacy at a subsequent stage of the cause.

April 14. 1853. A stream called the Earl’s burn is the march betwixt the lands belonging to the appellant Wishart, and those belonging to the respondents, Motherwell’s trustees, of whom Wylie was one. A reservoir belonging to a company was situated at the head of the Earl’s burn, and a dam dyke stretched across the stream itself, at a point in its course where it traversed the lands of the parties to this action, and served to divert a portion of the water to drive a mill situated on the respondents’ ground. In October 1839 the reservoir burst, and the waters carried away this dam dyke and altered the channel of the stream itself, severing, as the respondents averred, a strip of their lands, and annexing it to that of the appellant. This was, however, denied by the appellant, who maintained that the entire departure of the stream from its course did not exceed the breadth of the channel itself. Much damage having been done on both sides by the overflow, Wishart pro-

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ceeded, by his tenant, to plant trees, level the ground, and raise an embankment on his own side of the new channel. This was stopped by an interdict of the Sheriff, obtained by Motherwell's trustees on an allegation that these operations were an encroachment on their property. A record was thereupon made up, proof was taken, and after various procedure the Sheriff decided, in March 1845, that the appellant had encroached on the respondents' lands. Wishart advocated; and after declaring the record closed, the Lord Ordinary (Robertson), on 18th March 1846, remitted to Mr George Buchanan "to examine the respective properties of the parties, and to make a sketch thereof, laying down, 1st, The present course of the Earl's burn; 2d, So far as he can judge from the appearance of the ground or as the parties are agreed, the former course of the burn; and, 3d, The line of any embankment dyke, or other operation commenced or performed by the defender on the premises;" and to report specially, whether any trees had been planted by Wishart in the old bed of the burn, or in the space betwixt the old and new beds, and the precise nature and extent of any embankment raised by Wishart on his side of the present bed. Both parties reclaimed against this interlocutor; but the Court (1st Division) adhered, and in consequence Mr Buchanan made a report, with plans, shewing the old course of the stream alternatively, according to the statements of both parties, and the new course. Founding on this report, the Lord Ordinary, on 20th March 1850, pronounced an interlocutor with the following findings,—"*1mo*, Finds it established that encroachments were made by the advocator (appellant) on the old course or channel of the Earl's burn, both by building dykes, throwing up embankments of earth, and planting trees; *2do*, Finds that these encroachments are not shewn by the advocator to have been for the temporary protection of his property, as alleged; *3tio*, Finds that the same being in the channel of the river and beyond his boundaries were illegal, and, therefore, that the prayer of the original petition against proceeding further with these encroachments, and for an order to have the same removed, was well founded;" and he remitted to Mr Buchanan to lay down, at sight of the parties, march stones conformable to the dotted red lines in the plan prepared by him as the true line of the march. Against this interlocutor Wishart reclaimed; and the Court having adhered, reclaimed again against the new interlocutor of the Lord Ordinary, making, in the same terms, the remit anew to Mr Buchanan. The Court a second time adhered, and against these interlocutors the first of the present appeals was brought.

The *Lord Advocate*, and *Anderson*, Q.C., for appellant. This is a question, in the first place, of jurisdiction. The action was incompetent before the Sheriff originally, being truly an action regarding right of property. The allegation of the petition is of encroachment, and the encroachment is denied, thus bringing the question of property into dispute. But the proof did not establish the encroachment found by the Lord Ordinary. In this case it is competent to go into the proof, notwithstanding the provisions of 6 Geo. IV. c. 120, sec. 40. That statute enacts, that where a case has originated in the Sheriff Court and a proof has been taken there, the Court of Session shall, in reviewing the judgment proceeding on such proof, pronounce an interlocutor speci-

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April 14. 1853. *Wishart v. Wylie.* trying the several facts which they find to be established by the proof, and the several points of law which they mean to decide, and their judgment shall be subject to appeal to the House of Lords only on those points of law, but shall be final and conclusive as to the findings in fact. But here the Lord Ordinary was not content with the proof led in the Sheriff Court, but, under the provisions of the 59 Geo. III. c. 35, sec. 14, he took supplementary evidence on the subject, Mr Buchanan being in effect a witness. On this proof it is competent to claim the review of the House of Lords, the restriction in the statute 6 Geo. IV. c. 120 applying only to the proof in the Sheriff Court. The evidence of Mr Buchanan contained in his report was that on which the Court went, and it is utterly inconsistent to establish their conclusions. But the statute of 6 Geo. IV. has not itself been complied with, and on that ground an appeal is competent. The Lord Ordinary's interlocutor does not distinctly specify the facts which he finds proved, and therefore cannot be maintained; *Wemyss v. Wilson*, 6 S., Bell, App. Cases, 394. The decerniture is moreover *ultra petitem*, the petition praying only to have certain embankments stopped and removed, whilst the interlocutor proceeds to decern as to the laying down of the line of march by means of stones.

Solicitor-General (Bethell), and *Gordon*, for the respondents. The true question here was not one of property, but was in the action as raised merely possessory. Neither was the Lord Ordinary's interlocutor *ultra petitem*, for the foundation of the action was that the true line was in dispute, and the action could not be decided without settling the true line. But the review of this House is expressly excluded as to all matters of fact by the 6 Geo. IV. c. 120, and it is impossible to bring any part of the evidence under review, merely because of the remit in the Court of Session to Mr Buchanan. That was not to take evidence, but simply to give his opinion as a man of skill, in order to make the evidence more easily understood by the Court. But though it were to be held as evidence, the words in the 6 Geo. IV. c. 120 are sufficiently broad to comprehend such additional proof taken in the Court of Session. And even if this be not so, and this House should hold itself obliged to go into the whole proof anew, it is abundantly sufficient to support the decision of the Court below.

SECOND APPEAL.

The facts of this appeal were, to a certain extent, mixed up with those of the former, though the points of law which they involved were different. The overflow of the reservoir in 1839 having, amongst other damage, carried away the dam dyke used to divert part of the stream to a mill belonging to the respondents, the reservoir trustees agreed to replace it, and early in 1840 commenced to do so. It was alleged that the plan according to which it was to be made, was communicated to the appellant as proprietor of the opposite bank, was approved by him, and that the work during its progress was repeatedly visited by him. All this, however, he denied. In August 1840 he presented a petition to the Sheriff against Motherwell's trustees, complaining that they had rebuilt the dam dyke improperly, so as to throw the water greatly more upon his lands than formerly, and praying that they should be ordained to take it down and construct it differently, and be found liable in damages for the injury done to his property. Motherwell's trustees, in their

answers, denied that any damage had been done, and maintained that the dam dyke had been constructed in such a manner as to be more beneficial to Wishart than it originally had been. They explained that it had been built not by them, but by the reservoir company; and they soon after lodged a petition praying to have the trustees of that company called as defenders, as being liable in relief to them, should any damages be found due to Wishart. Wishart opposed this application, but it was granted by the Sheriff, and the reservoir trustees were accordingly called as defenders. The two actions were then conjoined, a record was made up by all the parties, and the Sheriff-substitute, on 18th October 1844, allowed the reservoir company a proof of their averments that the plan of the dam dyke was communicated both to Wishart and Motherwell's trustees, and approved by them, and was as similar as could be to the old one, and granted to Wishart and Motherwell's Trustees a conjunct probation. A proof was thereupon led by all the parties, on considering which the Sheriff pronounced an interlocutor, finding, *inter alia*, "that it is not proved that the plan and construction of the new dam dyke was approved by the pursuer previous to its being built," but that "the pursuer was cognisant of the dyke being in the course of rebuilding, and did not object to its position being other than in the line of the former one;" "that it is not proved that the dyke is of improper construction, or encroaches upon the pursuer's lands; that it is not proved that the water above the dam dyke has been raised to a great height, which previously it had never reached except in great floods;" and "upon the whole, that the allegations of the pursuer have not been established; therefore dismisses the petition of Mr Wishart, and assolizes the defenders from the conclusions thereof."

Against this interlocutor the appellant, for the first time in the course of the process, advocated. On 18th June 1848, the Lord Ordinary (Robertson) adhered *simpliciter*. On a reclaiming note, the Court remitted to him to frame his interlocutor in terms of the 6 Geo. IV. c. 120, sec. 40. Having done so, by finding specifically the previous findings of the Sheriff, Wishart again advocated, and pleaded, for the first time, that the mode in which the reservoir trustees had been called was incompetent, being by petition, instead of a summons in an action of relief. The Court (1st Division), on 12th June 1851, repelled the objection, and unanimously adhered to the Lord Ordinary's interlocutor. Against that interlocutor the present appeal was brought.

The *Lord Advocate*, and *Anderson*, Q.C., for the appellant. In this process there exists a fatal error in point of form, as well as of essential justice. The reservoir trustees have been brought into the action by a petition against them by Motherwell's trustees, the proper defenders, praying to have them found liable to Motherwell's trustees in relief. But a petition is a totally incompetent mode of commencing such a claim, being intended only for cases in which the delay required by a regular summons would be fatal; *Bell's Prin.*, sec. 2234; *Anderson*, 29th Jan. 1846, 8 D. 419, Act of Sederunt, 10th July 1839, sec. 137; *Jackson*, 20th June 1848, 10 D. 1356; *Logan*, 15th Jan. 1851, 13 D. 482. In *Montgomery*, M. 14,975, it was expressly found, that a claim of relief can only be prosecuted in an ordinary action. Further, the course adopted of conjoining a process of relief by a defender with the prin-

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cipal action was also incompetent; *Gray*, 7th Feb. 1837, 15 S. 494. These proceedings in the Sheriff Court were not taken at the time to review in the Court of Session, because they did not, however erroneous, fall under the class of cases in which advocacy is competent, resting neither on the incompetency defined in the 50 Geo. III. c. 112, sec. 36, nor on contingency, nor on any objection to the mode of proof. Neither could the pursuer advocate under the 6 Geo. IV. c. 120, in respect that the original petition did not claim any specific sum of damages, nor from the nature of the case could he make the declaration required by the relative Act of Sederunt of 11th July 1828, that the claim was actually of the true value of L.40. The damage was prospective, and could not be assessed. But, at any rate, these enactments relative to advocations are merely permissive, and do not make it imperative upon a party to take advantage of them, under the sanction of losing his right to plead the error in any subsequent advocacy of the whole cause. Such an advocacy is always in practice held to bring up the whole of the interlocutors in the cause. The result of the admission of the reservoir trustees as parties was, that when the order for proof was made, the lead in it was devolved on them instead of on the pursuer, who was thus prevented from establishing his own allegations on which the action was brought.

Solicitor-General (Bethell), and *Rolt*, Q.C., for the reservoir trustees; and *Gordon*, for the Motherwell trustees. The appellant is barred from insisting in this appeal, in consequence of his acquiescence in the proceedings in the Sheriff Court. He might have objected to the competency of the course there pursued, but he did not, or at least did not carry his objection beyond a mere statement. He went on with the cause as if he were perfectly satisfied, and the Court of Session most properly found, that after doing so he could not be permitted to open up the whole question, and have the action recommenced from the beginning. As the case now stands, the appellant has nothing on which to come before this House. Had it been decided that the reservoir company were liable in damages, they might have had something to say against the way in which they were made parties; but they were assoltied; and certainly Wishart cannot pretend that he has suffered injury by the previous course of procedure. A party who has an interest in the result of an action may be sisted without the consent of the pursuer; *Marquis of Douglas*, 15th Nov. 1811, F. C.; *Butchart*, 18th June 1841, 3 D. 1040. It cannot be contended by Wishart, who brought his action by petition, as a matter requiring extraordinary despatch, that the same cause did not authorise the calling of the reservoir trustees in the same manner, in order that the action might proceed. As to his objection that the lead in the proof was given to the reservoir trustees, it is entirely groundless; for it was as to points which were the foundation of his own claim, and he was allowed a conjunct probation. In fact, he cross-examined every witness produced on the other side, and examined, without opposition, as many witnesses for himself as he thought proper. It lay on him to shew that injustice had been done, and he had shewn none.

The LORD CHANCELLOR. My Lords, these two cases of *Wishart v. Wylie* come before your Lordships under circumstances which are, I hardly like to say, discreditable, but certainly very unsatisfactory as regards the good sense

of the parties themselves and, I am afraid I must add, the institutions of a April 14. 1853. country which can coexist with a litigation such as these two cases disclose. These parties have been engaged for fourteen years in a most angry and hostile litigation which, I think it was stated, has involved no less than 150 different decrees and orders of one kind or another, and all upon a matter which neither party could state,—for it was their interest at one time to have done so if they could,—amounted to the value of £40. The circumstances of the case arose from the overflow of a reservoir on a stream of water near Stirling, called the Earl's burn, somewhere in the centre of Scotland. This accident seems to have caused a divergence of the stream to a slight extent, upon the lands of the respondents. There was some dispute how far the variation had taken place; it was not beyond a few yards, or a few feet, but there does seem to have been a variation to some extent. That being so, Mr Wishart took on himself to put up a bank or dyke on his side the stream, as he contended, where he lawfully might put it up; Motherwell's trustees on the other hand contending that the dyke was not put up upon his lands, but upon what was their land. Now the law on this subject, I take it, admits of no doubt. If a stream separates properties A. and B., *prima facie*, the owner of the land A. on the one side, and the owner of the land B. on the other, are each entitled to the soil of the stream *usque ad medium aquæ*, that is *prima facie* so. It may be rebutted, but generally speaking, an imaginary line running down the middle of the stream is the boundary, just as if a road separates two properties, the ownership of the road belongs half-way to the one, and half-way to the other. If not rebutted by circumstances that is the legal presumption. Now the stream having altered its course, so as to be more on the lands of Motherwell's trustees, that did not alter the ownership of the soil, and if Mr Wishart built or did anything upon its new course, *prima facie* it must be taken that he was doing something illegal, being upon the land of Motherwell's trustees. And even if this were not so, and if what he built was on his own land on his own side of the stream, yet if it improperly threw the water upon the opposite lands, no doubt it afforded a good ground of complaint. But the former allegation was that made by Motherwell's trustees, and upon that they brought this action.

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The Lord Chancellor then proceeded to detail the steps of the litigation, of which a sufficient outline has already been given. Referring then to the final interlocutor by the Sheriff, he proceeded:—Now, my Lords, I confess that I have a very strong suspicion there, that the law was not rightly understood by the Sheriff. He seems to have supposed that because the burn was the boundary, therefore neither party could put a dyke or stone in it, because it was not the exclusive property of either, but was what he calls common property. That I apprehend to be a mistake of the law. The properties in such a case are divided by the imaginary line down the middle of the stream, but to say that the whole of the river is a sort of common property which belongs to no one, is not a correct statement of the law. After detailing the subsequent procedure in the Court of Session, the remit made to Mr Buchanan, and his report, the Lord Chancellor went on:—Coming then before the Lord Ordinary, what was it the duty of the Lord Ordinary to do? That depends, my Lords, upon the statute to which we were referred, 6 Geo. IV., c. 120, §

April 14. 1858. 40. It was his duty to find the facts as they were to be collected from the evidence before the Sheriff. But the attention of your Lordships was pointed to this, that under the 59 Geo. III., it is competent to the Lord Ordinary, if he thinks any matter has not been sufficiently inquired into before the Sheriff, to take supplementary evidence on that subject, and it was contended that this had been done by the Lord Ordinary by his reference to Mr Buchanan. Now, I do not think that is a correct representation of what took place. There was no evidence taken by Mr Buchanan at all. It was more convenient to have the subject-matter of dispute in the shape of a map, and the Lord Ordinary referred it to an engineer to make a map accordingly, but in truth there was no evidence. All that Mr Buchanan reported was the common case of both parties; he reported what the actual state of the stream was, and what each party said was the old stream. It may therefore be perfectly true, that if the Court takes, under the 59 Geo. III., additional evidence, the 6 Geo. IV. will not preclude the appeal to this House upon the facts so found. But it is not necessary to consider that question, because here I am clearly of opinion that there was no additional evidence taken. Then we come to the question,—Did the Lord Ordinary find the facts in the manner indicated by the Act of Parliament? I am of opinion that I am entitled to advise your Lordships to say that he did. The interlocutor is not quite so formally penned as it perhaps ought to have been, but I think that we may safely say that it did comply with the requisitions of the Act of Parliament. Whether the Lord Ordinary took the same erroneous view of the law as to the property of the bed of the river which I think it is obvious the Sheriff had taken, is a matter that I do not feel myself called to speculate upon. It takes the language of the interlocutor in its plain literal meaning, and it means that the embankments and the planting had been made in the bed of the river beyond that portion of the river which constituted the boundary, and that they therefore were legal encroachments. I give no opinion upon the evidence on which that fact was found. The Lord Ordinary's interlocutor is most wisely appointed by the Act of Parliament to be received by this House as a special verdict, conclusive as to the facts. What then upon that finding was the course to be pursued? Why, it must follow of course that there must be a decree ordering the removal of what had been improperly put upon the land. But before you can remove them, you must ascertain the exact boundary, because you cannot remove them blindfold. It was therefore a reasonable course to direct some steps to be taken to draw the line as it were. That was done by finding on the plan what the line was, and by appointing Mr Buchanan to lay it down on the ground itself. I think that was a most reasonable order. On the whole, I shall therefore move that the Lord Ordinary's interlocutor be affirmed. But I must own that it is so worded as not unnaturally to have induced the party to appeal. There is some obscurity as to what was meant by the Lord Ordinary with respect to the line which was to be adopted, and some doubt whether he had or had not strictly followed out the exigencies of the Act 6 Geo. IV. I shall therefore propose that no costs be given.

SECOND APPEAL.

The LORD CHANCELLOR then went over the various steps of the litigation

in this case, which have been already detailed, and with reference to the call- April 14. 1863.
 ing of the reservoir trustees as defendants and conjoining the two processes,
 said: Now my Lords, in my opinion, if it were necessary to decide such a ^{Wishart v.}
 point, that was a perfectly correct course. I rather think the cause could not ^{Wylie.}
 have properly gone on without having both parties, certainly without having
 the reservoir trustees, before the Court. I am inclined to think that the
 Sheriff took a perfectly correct view, but in my opinion, that is not a
 necessary question to decide, for if he did not, I am quite satisfied that under
 the Act of Parliament 50 Geo. III., c. 112, if Mr Wishart was dissatisfied,
 if he meant to say, you have no right to burden me with this new defence, he
 had a right of appeal. The provision of that Act is to the effect that any
 party complaining of any interlocutory proceeding shall only appeal amongst
 other cases where there is an "incompetency." Now it is quite clear, within
 the meaning of that section, that it would be an incompetent proceeding to
 compel a party to be in litigation with persons with whom he did not choose
 to be in litigation, and with whom he was not properly bound to enter into
 litigation; and if that were so, it is therefore clear that he would have a right
 of advocacy under this section. But Mr Wishart did not avail himself of
 this right of appeal, but went on in the case, and, therefore, even if there
 were error in this proceeding, which I do not think there was, the right of
 appealing against it was lost by Mr Wishart. The same day on which the
 record was closed, the parties were allowed to go to proof. I think it is not
 at all improbable that the Sheriff was wrong in the mode in which he directed
 the proof, because he laid the burden of proof upon the reservoir trustees,
 whereas Mr Wishart was the party on whom it ought to have been thrown.
 But as the Sheriff said, Mr Wishart at any rate had no reason to complain of
 this—for it laid on the reservoir trustees the burden of proving a negative—
 and he was fully permitted at the same time to prove his own averments. He
 did make the attempt to prove them, and upon the conclusion of the whole
 proof the Sheriff found that he had failed to make out his case. Mr Wishart
 took this by advocacy to the Court of Session, and the Lord Ordinary affirm-
 ed the Sheriff's judgment. But as he failed to do so by the separate findings
 required by the 6 Geo. IV., c. 120, the Court most properly remitted the case
 back to him that he might frame his interlocutor in the shape required by
 that statute. He did so, and the Court then affirmed it. Now that statute
 enacts that where that is done this House has nothing to do with the facts,
 but has only to see whether the law was properly applied to them. In this
 case, the facts being found that Mr Wishart's allegations were not true, the
 necessary result is that he could not have the redress he sought. Therefore
 I am of opinion that the interlocutor appealed from was perfectly right, and
 there being no obscurity about it as there was in the last case, I propose to
 your Lordships that it be affirmed with costs.

<i>Richardson, Loch, & Maclaurin,</i>	Westminster,	}	Agents for the Appellant.
<i>Hunter, Blair, & Cowan,</i>	W.S., Edinburgh,		
<i>Deans & Rogers,</i>	Westminster,	}	Agents for Motherwell's Trustees,
<i>Murray & Rhind,</i>	W.S., Edinburgh,		
			Respondents.
<i>Robertson, & Simson,</i>	Westminster,	}	Agents for the Reservoir Trustees,
<i>David Crawford,</i>	S.S.C., Edinburgh,		
			Respondents. (J. B. K.)

No. 12.

CAMPBELL v. LANG.

Right of Way.—Opinion, that there can be no public right of way except from one public place and leading to another public place; but *Held*, that it is not necessary that the point at which the way claimed terminates should be itself a public place, but that it is sufficient if there be from it an access to a public place.

Servitude—Process—Issue.—An issue cannot be taken for determining the existence of a servitude of way unless the pleadings have specifically set forth the claim to such servitude, and not merely averred the common use of the way by the parties claiming it.

Statute.—A private statute will not be construed so as to cut off by implication rights belonging to the public, unless such construction be inevitable.

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Campbell is proprietor of the lands of Blytheswood, situated at the confluence of the Clyde and Cart, and bounded on two sides by these rivers. Paisley is situated on the Cart, and the magistrates are trustees under various private Acts of Parliament for improving navigation of that river. In virtue of these Acts a canal was cut for some distance alongside the river on the Blytheswood or east side, passing in part through the lands of Blytheswood. On the east side of this, and of the river, where the canal joined it, a towing path was made. Under the last Cart Navigation Act, (passed 17th June 1835), it was provided, "that the said trustees and their successors shall be bound and obliged at their own proper charges and expenses to fence and enclose, in manner aftermentioned, the said towing path on its east side along its whole extent, from the termination of the present towing path to the river Clyde, viz., with a rubble wall and droved stone coping of the height of two feet four inches above the level of the towing path, and a malleable iron railing thereon five feet in height, and to maintain and uphold the said stone wall, coping, and railing in good and sufficient order and repair in all time coming." At the junction of the Clyde and Cart, and termination of this towing path, the Act authorised the Cart river trustees to erect a wharf or jetty for the landing and embarkation of passengers, with the luggage *bona fide* belonging to them, but not for goods of any description. To the use of this wharf the proprietor of Blytheswood was to have right for himself and his family and visitors without payment of any dues.

The town of Renfrew and the town lands belonging to it are situated on the Clyde about a mile above the confluence of the Cart and Clyde, and adjoin the lands of Blytheswood. The right of salmon fishing in the Clyde *ex adverso* of these lands belongs to the town of Renfrew, and it enjoys an undisputed right to a path-way for the tacksmen in these fishings from the town to the point where they are in the habit of drawing their nets, not far from the confluence of the Cart. But this right Campbell alleged was limited to the tacksmen and their servants. Other paths through his park to nearly the same point being claimed and used by various of the inhabitants of Renfrew, he raised an action of declarator against certain of them, of whom Lang was one, and the town council of Renfrew as representing the community, concluding to have it found and declared that he, as proprietor of the lands, was entitled to their sole and exclusive possession, and to prevent all parties from coming upon them saving the tacksmen in the salmon fishings, and saving any right in the public to the use of the banks of the rivers for the purposes

of navigation. In this action defences were lodged, averring the immemorial existence and possession by the inhabitants of Renfrew of a right of way along two different paths, one of them, that used by the fishers, and another leading from Renfrew to the confluence of the Cart. Articles 5 and 6 of their condescendence set out their claims as follows :—"The two roads referred to have each and both been for time immemorial or for forty years prior to the institution of this action, resorted to, possessed, and enjoyed by the public, and especially by the inhabitants and burgesses of Renfrew, as ways or means of communication for foot passengers betwixt the borough or town of Renfrew and the grounds or territory thereof and the rivers Cart and Clyde and intermediate places, as well as Inchuman, Paisley, and other places, to which there is access by the Cart, and the paths and ways on the banks thereof." "The said two roads have, during the period foresaid, been constantly and at pleasure used and enjoyed as ways or means of communication, as mentioned in the immediately preceding article, and as places of resort for walking or recreation by the inhabitants of the burgh of Renfrew and others, and as such, are of great value and importance to them, the more especially as in reliance on their rights over them they have allowed rights of a similar kind over numerous roads through other lands and grounds adjacent to the burgh, to be lost."

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Issues were thereupon sanctioned by the Court for trying the question as to these roads alternatively, as a public right of way, and as a servitude enjoyed by the inhabitants of Renfrew. See *infra*, p. 80. Against the interlocutor appointing these the present appeal was brought, with leave of the Court of Session.

Sir Fitzroy Kelly, and *Patton*, for the appellants. Mr Campbell is undoubtedly the sole proprietor of the lands of Blythswood, and as such, he has a right of way over them by a title which the respondents cannot have. Their title could only be supported by the evidence of persons who had occasionally travelled or idled along the banks of the river, a very inferior species of evidence to that which the appellant has in support of his claim of exclusive right. The roads or paths claimed lead only to the bank of the river; when there, persons who had travelled along them can get no farther save by passing over or upon the river. To do so they must make use of the wharfs and other erections made by the river trustees, and this would be in effect sanctioning the exclusion of the river trustees as well as Mr Campbell from property that belonged solely to them. But although this was a matter which would properly go to a Jury to determine if it stood merely on a custom alleged, yet here there comes in an Act of Parliament which is incompatible with any such custom, and shews that it cannot now exist. The Cart Navigation Act is a private local Act, but it is a public Act as regards the inhabitants of the neighbourhood affected by it. By that Act a fence was to be raised all along the line of the Cart down to the Clyde. That fence crossed the way which was claimed by the respondents, and blocked it up absolutely. If therefore there ever was a public way here that Act destroyed it, and was now conclusive evidence that it did not exist. Then, if the path went merely to a point which was not a public place, it could not be called a public path, the essence of which was that it should go from one public place to another

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public place. But apart from this the respondents could not have the issues they claimed for the purpose of establishing that they had any private or servitude right, because there are not averments in their condescendence sufficiently explicit on that head to support them. The pleadings do not set out that claim distinctly, and in the language of the English law there is therefore no issue; *Irvine v. Kirkpatrick*, 7 Bell's Ap. Cas. 186.

The *Dean of Faculty*, and *Rolt*, Q. C., for the respondents. (The point being undetermined, whether the Dean of Faculty or an English Queen's Counsel is entitled to lead, the course which had been previously adopted was followed in this case by Mr Rolt allowing the Dean to lead, under protest.) In this case nothing can be gone into save the question, whether the issues before the House are incorrect or are excluded? Whilst the evidence is yet unknown, it would be monstrous to hold that a private Act of Parliament, passed for a totally different object, and never mentioning the question of a right of way, should, by a side wind, be made to have the effect of taking away a right. It would be shewn, when evidence came to be taken, that it had not actually had that effect, and the barest possibility that it might not was sufficient to support the claim for going into the evidence upon the fact. As to the question what kind of a way it is that is claimed, it might be either a public or a private way, and the two sets of issues are indispensable to try the question fully. The averments by the respondents are amply sufficient to support their claim to a private way if they should fail to make out a right patent to the public. As to the objection that there can be no right of way except to a public place, there are many cases of ways not leading to public places in Scotland, and that a good right to them might nevertheless be established, had been found in the recent case of *Cuthbertson v. Young*. [*Patton*. That case is at present under appeal, and is therefore no authority here.] At any rate, it could not be said that a road leading to the banks of a navigable river did not lead to a public place, for it led to a place from which access could be had to a public place. It was sufficient if there was a way of issue from the point to which it led, and mattered nothing whether that issue were by land or water.

LORD CHANCELLOR. My Lords, the question which is to be tried in this case comes before us in the shape of issues from the Court of Session, and is substantially to try the right of a highway set out in these issues. Mr Campbell, the proprietor of Blythswood, claims the right to exclude all parties from passing over his lands; the defenders claim, as representing the inhabitants of Renfrew and the public, the right of passing in two directions over the pursuer's grounds. The Court of Session has allowed issues as to these disputed points, in the first place, as to whether the roads claimed are public roads? and, in the second, as to whether they are roads which the defenders have right to use? And the pursuer, in the first place, maintains that the issues now before us should not be allowed, because he ought not to be compelled to go into any proof as to a right which, he says, has been taken away by an Act of Parliament. I agree with him that that is a point which he is entitled to have decided before he is compelled to go into a trial. But to determine whether this Act has had the effect he contends for, it is necessary that I should assume that the defenders had, prior to its passing, the fullest right of

way along the path which they claim. And it would be matter of deep regret May 6. 1858. if, under the circumstances, this House were to be compelled to construe a private Act with such strictness as to take away such a right. The Act was to improve the navigation of the Cart, and to authorise the formation of a towing path along its bank. That being so, it was of course necessary that the adjacent lands of the pursuer should be protected from injury and from intrusion from the towing path. To secure these ends many provisions were made in the Act. But it cannot be imagined that these provisions were intended for the further object of annihilating the right of the public to pass where they had from time immemorial been in the habit of passing. That construction would be an extremely forced one, and one which every court of justice must be anxious to avoid. But it requires no astuteness here to avoid it. I have only to take the plain meaning and plain object of the Act, and neither lead me to any result of the nature contended for. It is clear that when the legislature said a fence was to be made, it meant such a fence as could be made consistently with existing rights. This view is confirmed by the necessity for qualifying the description of the fence with the condition that Mr Campbell and his family should be able to pass through it. For the Act gives him a right to use the wharf or landing place that was to be erected. He could not do so without passing from his own grounds to the river side. And qualifying the enactment with reference to that right given to him, we must qualify it further, and the inference becomes irresistible, that the legislature never meant any fence to be made to interfere with rights of way to which that fence would have been injurious. But then the pursuer says that though he should fail on that point, yet that the issue is wrongly directed, because it is, as he says, to try the existence of a right of public way which does not lead to any public place, but only to the confluence of two navigable rivers. Now, my Lords, on that subject I do not believe that there is any difference between the law of England and the law of Scotland. I believe the pursuer is quite right in maintaining that there cannot be a public right of way except the way be from one public spot to another public spot. There cannot be in England, and I do not believe that there can be in Scotland. But it is not necessary to decide that point, and I only advert to it to prevent this House from being understood to acquiesce in the doctrine of the legality of a public right of way going no where, but running back to the same spot. Without much further argument, the House could not sanction that view of the case as the Dean of Faculty has suggested it. But, on the other hand, I do not think it is at all necessary that the place at which the road claimed stops should be itself a public place. I think it is quite enough if it be a place from which public access can be had to a public place. And, therefore, the question does not arise, as the appellant wishes to make out that it does, whether the confluence of two rivers be itself a public place? But it will be sufficient if the respondents can establish that they have a good right of way from a valid *terminus a quo* going to a point from which they have a right to go on further, to a valid *terminus ad quem*. And I think the two first issues, though I wish they had been framed with a little more accuracy, do raise that question sufficiently well to enable it to be satisfactorily tried, and, therefore, I am prepared to advise your Lordships to approve of them. As to the last two issues, I con-

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fess I concur in the view of the appellant here. I do not think that any case is raised in the condescendence to entitle the defenders to such issues. What is attempted to be raised by them is this, that supposing it is not made out that there is a general right on the part of all the public to use these roads, yet there has existed a special private right on the part of the inhabitants of Renfrew to use them for their own private benefit. The 5th and 6th articles of the condescendence are chiefly relied on in support of this claim. But the true construction of these articles does not bear it out, for they mean only that these roads have been used by the public, and especially by the inhabitants of Renfrew, that is, more frequently by the inhabitants of Renfrew. Of course that would be so, as the roads lie nearer to their residence than to any others', but the pursuer could not possibly have inferred from these statements that a private right of road was meant to be claimed. Therefore these issues must be struck out; and I shall do so by moving that the first interlocutor, that allowing issues, be affirmed; that the second interlocutor, that approving of the issues in question, be varied; that of the issues directed, the first two be allowed and the last two disallowed, and that with that direction the cause be remitted to the Court of Session. With regard to costs, though there has been this little variation, yet, as the respondents have gained what was substantially the question here, I am of opinion that the appellant must pay the costs, with the exception of such as are occasioned by the variation as to the two last issues.

Issues allowed by the House of Lords :—

1. "Whether, for forty years, or for time immemorial prior to the institution of this action, there has existed a public path or foot-road, sometimes called the 'Laigh Road,' or 'Meadowside Road,' or 'Waterside Road,' leading from the burgh of Renfrew, or the grounds or territory thereof, entering the lands of the defender at a point at or near the recently constructed ship-building yard of James Henderson & Son, passing through the defender's lands along the south bank of the river Clyde, and proceeding onwards to the rivers Cart and Clyde, at a point at or near the confluence of the said rivers?"

2. "Whether, for forty years, or for time immemorial prior to the institution of this action, there has existed a public path or foot-road, sometimes called the 'Heigh Road,' or 'High Road,' or 'Fisher's Road,' or 'Grannie Mitchell's Road,' from the said burgh, or the grounds or territory thereof, passing by a place now occupied by a school-house, called the 'Blythswood Testimonial,' onwards to the site of the house presently occupied by the defender's game-keeper, and thence through the defender's lands on the south bank of the Clyde, but at a greater distance therefrom than the said Laigh Road, till it reached the banks of the rivers Cart and Clyde, at a point or near the confluence of the said rivers?"

Interlocutor allowing issues affirmed with costs, and case remitted back to the Court of Session, with instructions to allow first and second issues, and proceed farther in the cause.

Connell & Hope, Westminster,

Walker & Melville, W.S., Edinburgh,

Grahame, Weems, & Grahame, Westminster,

John Martin, W.S., Edinburgh,

} Agents for Appellant.

} Agents for Respondents. (J. B. K.)

INGLIS v. INGLIS.

No. 13.

Entail.—Terms of a later deed which was held to supersede a deed of tailzie duly recorded, but never feudalized, to the effect of making the investiture flow from the later deed.

The facts of this case will be found set forth, *ante*, vol. i. p. 30. The arguments and cases cited were the same as those relied on in the Court below. May 10. 1853.

The *Lord Advocate*, and *Turnbull*, were for the appellants.

Inglis v. Inglis.

The *Solicitor-General* (*Bethell*), and *Anderson*, Q. C., were for the respondents.

The LORD CHANCELLOR had no difficulty in affirming the interlocutors appealed from. The marriage contract of 1730 undoubtedly superseded the unfeudalized tailzie of 1704. Its provisions were essentially distinct from those of that deed. A power of leasing was granted by the later deed far more extensive than that which the former deed had given. The provisions as to the heir of entail bearing the name and arms of the respective estates were also materially different; therefore there was no ground on which the maxim *applicando singula singulis* could here be applied. The obvious purpose of the later deed was to conjoin the two estates under a new entail, and this was made the more obvious by the fact that another estate though included in the destination of the deed, was expressly excluded from the operation of the entailing clauses. But that intention to entail the lands of Halhill never having been duly carried out, the deed never having been registered, it failed altogether, and the estate therefore was held in fee-simple, and might be disposed of as such by the proprietor.

Interlocutor affirmed with costs.

<i>Law, Holmes, Anton, & Turnbull</i> , Westminster, <i>Rolland & Thomson</i> , W.S., Edinburgh, <i>Maitland and Grahame</i> , Westminster, <i>James Dalgleish</i> , W.S., Edinburgh,	} } } }	Agents for Appellant. Agents for Respondent.
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(J. B. K.)

ROYAL BANK v. GARDYNE.

No. 14.

Ground-Annual—Singular Successor—Personal Liability.—Personal liability for payment of a ground-annual does not transmit to a singular successor in the heritage in respect of which it is payable, but remains with the original disponent.

Disposition with back-bond—Heritable security.—Opinion that where the law allows parties to burden their property by conveyances on the face of them absolute, it may give rise to great difficulties if the Courts should hold that such instruments are not to have all the qualities which, on the face of them, they purport to have.

By contract dated 10th and 11th October 1836, J. Gardyne disposed to Daniel Duff and his heirs and assignees heritably and irredeemably, certain subjects in Dundee, and bound and obliged himself, his heirs and successors to infest Duff therein *more burgi*, "for service of burgh used and wont, and for payment of the ground-annual and others after expressed, and of the burgh maills and the public burdens exigible furth of the subjects." The procuratory of resignation following was granted "with and under the real and preferable burden of the ground-annual, or yearly payment of £83, 5s. sterling," with interest and penalties, &c., "payable for and furth of the said May 13. 1853.

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May 13. 1853. subjects before disposed." It was then expressly declared that the said ground-annual, &c., should form a real and preferable burden over the said subjects, out of which they were payable, and as such should be specially engrossed in the instrument of sasine, and in all future conveyances and infestments of the same, and that any such conveyances, &c., in which that condition was not complied with should be *ipso facto* void and null. But a power of redemption of the ground-annual was granted to Duff and his fore-

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said, on payment at any time, with six months' notice, of the sum of £1665.

The counterpart of the contract was as follows:—"For which causes and on the other part, the said Daniel Duff hereby binds and obliges himself and his heirs and successors to make payment to the said John Gardyne and his foresaids, of the foresaid sum of £83, 5s. in name of ground-annual or yearly payment, and that at two terms in the year," &c. It was then declared that on two years' ground-annual at any time running into arrear, the contract should, at the option of Gardyne, become *ipso facto* void and null, without the necessity of using any process of law to that effect, and that it should not be competent to Duff or his foresaids to purge the irritancy at the bar in any process of removing which Gardyne might bring. But notwithstanding such irritancy, it was to be competent to Gardyne and his foresaids, in case of not punctual payment, "to render effectual their hypothec therefor as accords of law, and to poind and distrain for payment of the said ground-annual as it falls due." The declaration that the ground-annual was to be held a real burden, and as such to be inserted in the infestments, &c., was then repeated. And it was accordingly so inserted, in the terms of the procuratory, in the sasine which Duff took. That sasine was recorded on 14th October 1836.

On 12th October, Duff had already disposed the subjects to the Royal Bank. The conveyance was in the ordinary terms of an absolute disposition, except that in two places it referred to a back-bond. The first reference was in the narrative, which bore that the disposition was "for certain onerous causes and considerations specified in a back-bond, granted, or to be granted, to me by the Royal Bank of Scotland, written upon paper denoting a stamp duty of £23, agreeably to law, wherewith I hold myself content and satisfied." The second was in a provision near the end of the deed, that "although these presents bear to be granted for certain onerous causes and considerations specified in a back-bond granted, or to be granted, to me by the Royal Bank," yet it is declared that purchasers of the subjects from the bank, or others with whom it might contract in any way regarding them, should be no wise concerned with the application of the prices, rents, or sums they might pay, nor with any of the conditions of the said back-bond, but be sufficiently exonerated by the simple receipt of the bank." What were the conditions of the back-bond did not anywhere appear in the disposition; nor in the sasine which the bank immediately took and recorded, was there contained even the mention of it, which the disposition bore. Both the disposition and sasine however contained *ad longum* the provisions relative to the ground-annual made in the original conveyance. And the disposition further contained an obligation, on the one hand, on Duff to free and relieve the bank of all maills, feu-duties, ground-annuals, and other burdens then due; and, on the other

hand, on the bank and their foressaids to free and relieve Duff of the same in May 13. 1853.
all time thereafter.

The back-bond declared, nevertheless, that this disposition though *ex facie* Royal Bank v. Gardyne.
absolute, was granted in security only of advances made and to be made by the bank to Duff. The right of redemption which it reserved to Duff was to expire if at any time after Martinmas 1838 he should fail to repay these advances in full, on six months' premonition, and the bank was then to be entitled to sell the subjects in satisfaction of their debt, accounting to Duff for any surplus. But it provided that any leases which might in the meantime be granted by the bank should be valid, although Duff should exercise his power of redemption.

It was alleged by Gardyne that this back-bond remained entirely latent, and was not even delivered to Duff. It certainly was not recorded till 1841, after the commencement of the present action. In the meantime, the bank dealt with the subjects as absolute owners. It let the subjects to Duff by a formal lease, and it paid the ground-annual for some years by the hands of its agent in Dundee, taking receipts for it as due for property conveyed to Duff, but now belonging to them.

Duff fell into difficulties in 1837. In consequence he executed in November of that year, a trust-deed in favour of Thoms, the agent for the Royal Bank at Dundee, disposing to him his whole property, and particularly his right of reversion under the back-bond, and his right under the lease which he held of the bank. The purposes of the trust were the liquidation of the advances made by the bank, or which might be made by it for settling the claims of Duff's other creditors, and the security and relief of Thoms as their agent and Duff's trustee.

In 1840 Duff was sequestered. Thereafter Thoms refused longer to pay the ground-annual,—and in 1841 Gardyne accordingly raised the present action against the Royal Bank, concluding for declarator, that the ground-annual was a real burden over the subjects, that the bank as feudally infest, and in possession, and its successors in the same, were liable to pay the ground-annual,—and for payment of the amounts past, and to fall due therefor. The bank lodged defences, setting forth *inter alia*, that the back-bond was now recorded, and that they were in process of executing a discharge and renunciation of their security over the lands, which was all the right they ever held therein. The Lord Ordinary (Cuninghame), on 24th Dec. 1842, assolizied the defenders. On advising a reclaiming note, the Second Division of the Court ordered cases. In 1845 the bank lodged a minute of reference to oath of Gardyne, “whether he knew or understood at the time when the bank were in possession, that they were not proprietors of the subjects in question, but held them as creditors in security only?” The reference was sustained, and on advising the deposition of Gardyne, the Court held it negative. The bank then executed and put on record the deed of discharge and renunciation referred to in their defences, as from October 1840. On 18th July 1845, minutes of debate were ordered, on advising which the Court was divided. The Lord Justice-Clerk held that the bank's liability only ceased at the date of executing the discharge and renunciation, Lord Medwyn held that it would continue till a new disponent were infest.

May 13. 1853. *Royal Bank v. Gardyne.* Lords Moncreiff and Cockburn held that from the date of recording the back-bond, the bank's right was one merely of security. The other Judges were therefore consulted, and of these, Lords Mackenzie, Ivory, Fullerton, Murray, Wood, and Dundrennan, concurred with Lord Medwyn; the Lord President, with Lords Cuninghame and Robertson, concurred with Lords Moncreiff and Cockburn. On advising their opinions, the Lord Justice-Clerk stated that he also was now of the same mind as the majority. The final interlocutor on 11th March 1851, found "that it was never averred, and was not the fact, that the trustee on the sequestrated estate of Duff ever took the heritable subjects in question, or even entered into possession of the same; and that the defenders remained after the sequestration in right and possession of the subjects exactly as they had been before that occurrence under the title referred to in the summons; and maintained in this action their right to continue such right and possession; Find that they remained after the sequestration under the same liability for the ground-annual, secured over the subjects as before; Find that the defenders as feudally infest in the said subjects, held burgage by regular and unconditional resignation in their favour, must remain liable for the ground-annual till a title is completed in favour of another vassal." The other findings were for payment of the ground-annual, in terms of the conclusions of the summons.

Against this interlocutor the present appeal was brought.

Solicitor-General (Bethell), and Gordon, for the appellants. This case is ruled by the recent decision of the House in the case of *Millar v. Small*, (*ante*, p. 60.) There it was held that a purchaser of property subject to a ground-annual, coming under a personal obligation to pay such ground-annual, did not free himself from that obligation by transferring the property to another. That law is directly applicable to the present case, and established that Duff's liability being unaffected by any transaction which might be gone into by him, the party with whom he contracted could not come under liability. This being so, the question on which the Court below was divided, was unimportant. But even on that, the views of the minority of the Judges were the only ones which could be taken consistently with the intention of the parties, and with the terms of the deeds which had been executed to carry them out.

The *Dean of Faculty*, and *Sir Fitzroy Kelly*, Q.C., for the respondent. This case is not by any means ruled by that of *Millar v. Small*. It is one to be decided by the rules of the feudal law. According to these rules the ground-annual had been validly constituted a burden on the lands. A new vassal completely divests the old of all such obligations, which, by the very act of entering, he takes upon himself. All the obligations incurred were such as run with the land. The same doctrine was applicable here as in the case of leasehold property. The assignee of a lease is personally liable for the rent, although in addition the land itself is liable. Here the bank entered further into an express covenant to take the liability on themselves. They held the lands subject to that covenant, and under a disposition which conferred on them absolute ownership, and it could not be that by any secret proceeding they could alter their character from that of owners into mere holders of a security.

The LORD CHANCELLOR, after narrating the previous deeds and steps of the May 13. 1853. procedure above set forth, proceeded—Now, my Lords, the decision of the Court of Session rested on these two grounds, 1st, that Gardyne had a right to treat the bank as being the absolute owners and not as mere creditors holding in heritable security; and, *secondly*, that being owners they are personally liable for the ground-annual, until they make a *bona fide* transfer to a new vassal. The only difference of opinion among the Judges was as to the first point. Eight of them were of opinion that where the procuratory of resignation is absolute, and sasine is given absolutely, as in this case, that the creditor so getting resignation and sasine is vested in the original and radical right of the granter, becomes the vassal, and the only vassal, of the Crown, and that his right can only be extinguished by a new resignation by him in favour of the debtor or some one else, and such other person being duly infeft thereon, and that till such new infeftment is made he continues liable in all the burdens attaching to a regular purchase. The other Judges thought this a narrow and technical view of the law; they thought that the question must be decided exactly as if the resignation and sasine had borne on their face that the transaction was one of security only, and that the circumstance of such declaration being made by a separate deed, must not be allowed to alter the true nature of the whole transaction. But in the view which I have taken of the case, it is not necessary for this House to decide on which side of this question the weight of argument preponderates. I will merely remark in passing, and in accordance with the view taken by the majority of the Judges, that where the law allows parties to burden their property by conveyances on the face of them absolute, it may give rise to great difficulties if the Courts should hold that such instruments are not to have all the qualities which, on the face of them, they purport to have. But it is not necessary to pronounce any judgment here on that point, for it is plain that all the Judges have, on the other part of this case, been proceeding on a view of the law which, after the decision of this House in *Millar v. Small*, cannot be sustained. All the Judges assume that supposing the Royal Bank to have been actual purchasers, and so owners, they would clearly have been responsible for the ground-annual; that, according to the law as laid down in the case of *Soot's Trustees*, Duff was not bound after he had disposed to the Royal Bank, but that his original personal liability then attached to his disponees. Clearly had this been law, the decision was right. But this House in *Millar v. Small* declared that the first disponee does not lose his personal claim over the disponee, by the latter disposing the property afresh. Gardyne, therefore, never lost his personal remedy against Duff; and it is only carrying out the principle of that decision, to say that Duff's disponee never incurred any personal liability. It was not competent to Duff to give Gardyne any such right, as little as it was in his power to escape from the liability he had himself come under. It is hardly necessary to remark that there is here no personal obligation whatever arising from the mere tenure of the land independently of contract. In the case of superior and vassal, as in that of landlord and tenant, there is a personal obligation on the vassal or tenant for the time being. That arises from the principles of tenure, and in both cases is a consequence of what in this country is called a privity of estate. But the doctrine has no application to a

May 13. 1853. case like the present, where there is no such relation existing. This is very distinctly laid down by Lord Wood in his opinion in the case of *Soot's Trustees*. His Lordship states, that in the old cases of ground-annual there was no personal obligation laid on the disponent, and consequently the land alone was liable, and alone could be attached for arrears. But in modern times the form of the deed was altered by the addition of a clause of personal obligation on the part of the disponent, so as to give a right of personal recourse against him. But in *Millar v. Small* your Lordships decided that this personal liability could not be got rid off by getting rid of the land; and now, in accordance with the principle so laid down, I must advise your Lordships to declare that such liability cannot be laid upon any other party purchasing from the first.

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Interlocutor "reversed," and cause "remitted."

<i>Richardson, Loch, and Maclaurin</i> , Westminster,	} Agents for Appellants.	(J B. K.)
<i>Dundas and Wilson</i> , C.S., Edinburgh,		
<i>T. W. Webster</i> , Westminster,	} Agents for Respondent.	
<i>J. S. Johnston</i> , S.S.C., Edinburgh,		

No. 15.

ADAMSON v. BARBOUR.

OR PARISH OF GLASGOW v. PARISH OF LOCHWINNOCH.

Poor—Settlement.—Where a father who had no subsisting settlement other than that of the parish of his birth, had been transported, leaving a wife who, though not requiring parochial relief for herself, was unable to maintain her children :—*Held*, reversing judgment of Court of Session, that the liability to support the children attached to the parish of the father's settlement by birth.

May 30. 1853. Duncan M'Intyre was born in the parish of Lochwinnoch. He had gained no residential settlement for himself. He had five children, of whom two were born in Falkirk, one in Linlithgow, and two in Glasgow. In July 1846, being then resident in Glasgow, he was apprehended on a charge of theft, and was sentenced to transportation for seven years. His wife being unable to support her children, applied to the city parish of Glasgow for aid. It was first granted on the 20th August 1846, and was continued afterwards. In 1849 the parish of Glasgow raised an action in the Sheriff Court of Renfrew against the parish of Lochwinnoch, for reimbursement of these advances, and relief from the future burden and maintenance of the children. It was decided in the Sheriff Court in favour of the pursuer. The parish of Lochwinnoch advocated, and the case, under the recent Judicature Act, was taken directly to the Second Division of the Court of Session. On 2d July 1851 the Court sustained the reasons of advocacy and assoilzied the defender Robert Barbour, inspector of the poor of the parish of Lochwinnoch, on the ground, that in the circumstances the parish of the children's birth, and not that of their father's birth, was the one bound to support them. Against this decision, Adamson, the inspector of Glasgow, brought the present appeal.

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Rolt, Q.C., and *Anderson*, Q.C., for the appellant. The settlement of legitimate children, whilst pupils and unemancipated, is determined by the settlement of their father, equally whether the father be dead, absent, or living

with them ; 2 *Hutchison's Justice of the Peace*, 64 ; *Bell's Dict.*, 746 ; *Bell's May 30. 1853. Prin.*, § 2157 ; *Coldingham*, M. 10, 582 ; *Howie*, Mor. App. v. Poor, 1. The same principle is applicable to the case of bastard children, with reference to the settlement of their mother ; *Rescobie*, M. 10,589 ; *Gladsmuir*, M., App. v. Poor, 5. In *Lasswade v. St. Cuthberts*, 6 March 1844, 6 D., 956, it was found that the mother of a bastard child never having acquired a settlement in her own right, her settlement was that which had been acquired by her father whilst she was in pupillarity, even though she was then not resident with him, which parish was consequently held bound to support her illegitimate infant. The case of *St Cuthberts v. Jedburgh*, 26th February 1851, 13 D. 783, was the first in which it was held that the settlement of the father must be one acquired by residence, and not by his own birth, in order to make it on his death or desertion the settlement of his children. The argument on which this was partly put, that the liability, if it were to rest on the parish of the father's birth where he had acquired no industrial residence, might occasionally have to be carried indefinitely back, because neither he nor his grandfather nor remoter ancestors might ever have acquired an industrial settlement, is unsound. All that is here contended for is this, that in the case of unemancipated children, so soon as by marriage they emancipate themselves it is the parish of their own birth that becomes liable to support them and their children till a residential settlement shall be acquired ; opinion of Lord Ivory, *Gray v. Fowlie*, 9 D. 811. But even though the decision in the case of *St Cuthberts v. Jedburgh* were sound, the present case is distinguishable from it by the circumstance, that in that case the mother of the children had died previous to the father's desertion, whilst here she is still alive. Her settlement is that of her husband, and her settlement whilst she lives is also the settlement of her infant children ; *Gray v. Fowlie*, *supra* ; *Thomson v. Lindsay*, 27th Feb. 1849, 11 D. 719 ; 2 *Hutcheson*, 67 ; *Crieff*, 19th July 1842, 4 D. 1538.

The *Lord Advocate* and the *Solicitor-General* (*Bethell*), for respondent. There is not one authority to be found for the doctrine that the settlement of the father by birth is the settlement of his children also. All the cases cited on the other side are only to the effect that his settlement by residence is so. The case of *Penicwick*, 3d March 1813, F. C., is not in point, being only the case of the foreign born children of a foreigner, found destitute in Scotland. Where the father is alive and in the country it is his settlement that rules that of the children, and they only get relief through him, and in respect of his age or impotence ; *Lindsay v. M'Tear*, and *M'Williams v. Adams*, House of Lords, 26th March 1853, *ante*, vol. i., p. 668. Here M'Tyre was not on either ground entitled to relief for himself, and therefore could transmit no such right to his children. Their right to relief, if it existed, must therefore stand on altogether independent ground. This might have been the father's residential settlement, accruing to the children as their own residential settlement ; but if that fails there is no reason why the settlement acquired by them by mere birth should not supersede the settlement of their father by his mere birth. Their settlement by birth is dormant, until they themselves, becoming objects of relief, call it into force ; so soon as that takes place, from whatsoever cause, it comes into force, unless it had been meanwhile superseded by an industrial residence acquired for them by their father. These views,

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May 30. 1853. several times expressed in the Court below, were at last embodied in express decision in *St Cuthberts v. Jedburgh*, *supra*. No valid distinction betwixt that case and the present exists. The wife's settlement being dependent on that of her husband, cannot affect the settlement of the children, whether that be dependent on the same circumstance or altogether independent.

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THE LORD CHANCELLOR. My Lords, the question here is, what is the law of Scotland as to the settlement of a child who is driven to seek parochial relief, owing to its being abandoned by its father? The appellant contends, that until the child is emancipated as we say in England, *foris-familiated* as it said in Scotland, his settlement is constantly that of his father; that he is, to adopt the illustration of Lord Jeffrey, but a branch arising from and inseparably connected with the father as the root. And then he contends as a corollary to this doctrine, that when from any cause, whether it be the death, or desertion, or transportation of the father, his children become entitled to parochial assistance, the parish to be resorted to is that of the father, and not that in which the children were born. The respondent, on the other hand, says, that so long as a child is not *foris-familiated*, if the father gain a settlement by residence the child gains it too, but that if the father either loses his settlement so gained by residence or never has gained one at all, the child must seek relief from the parish of its own birth, and not from the parish in which the father had a birth settlement. It is to be observed that neither in England nor Scotland does the statute law make any provision as to derivative settlements. In Scotland there are but two original settlements, that acquired by birth and that acquired by residence. In England, as we know, there are many, and were till lately more. But all the settlements which have been created by statute are original settlements, given expressly, or implied by the right of settlement to the person himself, who by some act of his own gains it. But yet early in the administration of the poor law, it was held that it was necessarily to be understood, that as the wife must be with her husband, and the children with their father, any settlement gained by him was gained not for himself alone, but for all his family. A leading case on this subject is that of *Cumnor v. Milton*, 2 Salkeld, 524, more distinctly reported in 3 Salkeld, 259. Lord Holt there says, "The place where a bastard is born is the place of his settlement, unless there is some trick to charge the parish, but the place where legitimate children are born is not the place of their settlement, for let that be where it will, the children are settled where their parents are settled, as for instance, if the father is settled in the parish of A., but goes to work in the parish of B., and before he gains any settlement there, has a son born to him in the parish of A., and then dies, this child shall be sent to the parish of A., for it is not the birth but the settlement of the father that makes the settlement of his child, and if the father hath gained a new settlement for himself, he hath likewise gained a new settlement for his children, who do not go with him as nurse children, but as part of his family." The principle has been acted on ever since, and the English Courts have not hesitated to pursue it through all its consequences. And great difficulty must arise in the application of the principle, if it is not followed through all its consequences. But acting steadily and consistently on the rule, it is obvious, and it certainly is the case in England, that if a child

during nonage, (before emancipation as we should say), in consequence of being deserted by its father is compelled to seek parish relief, it must look for it from the father's parish. But it is said that the rule is otherwise in Scotland. It is said that during the life of the father the child has no right to relief for itself, and the claim of the father is only in the event of his own age, or infirmity, and then is only increased in extent by the wants of the child, whom he is bound to support. But that if a parish has ceased, by the death, or desertion, or transportation of the father to be liable to support him, it is under no obligation to support the child. The child then seeks relief on a new foundation, *i.e.*, on its own claim as a destitute child, and must as such resort to the parish of its own birth. This is the ground on which the Court of Session has rested its judgment in the present case, but the real question is, whether there are not other elements which ought to have been taken into consideration, and which would have led to a different result. I think there are. Considering the peculiar nature and object of the poor law, the affording relief to those unable to maintain themselves, it is absolutely necessary that we should construe the provisions of the legislature so as to meet the ordinary social wants of those for whose benefit they were made. It was acting on this principle that we in England permitted the doctrine of derivative settlements at all. The monstrous consequences which would have flowed from not adopting the doctrine were deemed sufficient to sanction the Court in holding that it was implied by all the enactments as to settlements. I see no reason why the same principle of construction is not to be adopted in Scotland. If the father had in this case gained a settlement by residence, it is admitted that this would have served for the benefit of his children as well as of himself. This was the case of *Lasswade*; and I cannot understand why a different consequence should follow when the father's settlement is not one acquired by residence but one which he had by birth. The principle of a derivative settlement acquired by residence is, that for all purposes relating to settlement the father is understood to comprise in himself all his children who are yet in a state of nonage. This principle is the result of a construction which the Courts have felt warranted, in the absence of any express enactment, in putting on the statutes relating to the maintenance of the poor. But if the principle is admitted at all it cannot be confined to the case of a settlement acquired by residence, but must extend also to the father's residence, however acquired, whether by birth, or by his own residence, or by his father's residence.

I observe the Lord Justice-Clerk says that this question as to the supposed cruelty of separation is one merely of sentiment. Now I entirely agree with what is there implied rather than expressed, namely, that it would be most unfit to allow any Court to violate or strain the law in order to avoid any fancied or even any real hardship in its application. But the question here is, not what is the consequence of an admitted law, but what is the law? And in answering that inquiry, where there is no positive statute to guide us, it is surely a legitimate element for consideration that one interpretation avoids, while the other admits and sanctions what is harsh and revolting to the common feelings of our nature. In the English case of *Cumnor v. Milton*, to which I have already referred, Mr Justice Powell (a very high authority) is reported to have said, "The children's settlement shall not be divided from

May 30. 1853. the father, for that would be unnatural." He gives as a reason, and the only reason, for what would be in the absence of positive statute the law on the subject, that the contrary construction would be unnatural. The same principle of reasoning is equally applicable to Scotland. I do not discover in the Scottish text writers on this branch of the law, nor in the decided cases until very recently, anything tending to bring into question these principles. On the contrary, settlement by parentage is spoken of as something well known to the law of Scotland in the treatises as well of living as of deceased writers on this branch of the law, and the doctrine was acted on in the case of *Coldinghame* in 1779, of *Howie* in 1800, which was a case of desertion, and in the case of *Lasswade* in 1844; and there are other authorities to the same effect. I am aware that in these cases the settlement by parentage was a settlement gained by the residence of the parent, and not that of his birth; but I have already said that I am unable to discover any distinction in principle between the two cases. The moral necessity of treating the whole family as one and indivisible is the same in both cases. The evil of dispersing the children into different parts of the kingdom, instead of keeping them together, and so giving to family affection its fair chance of operating favourably on the character, and contributing to the happiness of its objects, is as great when the parent has not as when he has gained a settlement by residence. I see no ground for the supposed distinction.

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I am aware that in coming to this conclusion your Lordships will not only be reversing the decision in the present case, but acting in opposition to the principles on which the Court below went in the *Jedburgh* case. In fact, it was candidly stated that the present appeal was intended to call in question the doctrine of both cases. And I am fully aware that the grounds on which I am prepared to advise your Lordships to reverse this decision would lead to a similar result in the *Jedburgh* case. A distinction was indeed attempted to be drawn on the ground that here the mother is living, whereas in that case she had died before the desertion took place. But this distinction can clearly not avail in favour of the respondents, and I am satisfied that the parish of Lochwinnoch would have been liable even if she had been dead.

I am clearly of opinion that by the law of Scotland, as by that of England, legitimate children during nonage are to be considered as so far identified with the father that it is to his place of settlement, however constituted, that they are to look for relief, when they are so circumstanced as to be entitled to relief at all; and I come to this conclusion because any other interpretation of the law of settlement would or might lead to a harsh and violent severance of the domestic tie in a manner which I cannot believe the legislature to have intended.

LORD BROUGHAM. My Lords, I entirely agree with my noble and learned friend in the view he has taken of this case. I have had the advantage, by his courtesy, of perusing the very clear and distinct statement of the grounds on which he has formed that opinion, and I need not trouble your Lordships further, except with a very few words respecting the state of the case in the Court below.

One should hesitate far more than I am now at all disposed to do, in reversing a decision of the Scottish Courts, if we had found a distinct and

clear unanimity in the opinion of those learned Judges. But that is very ^{May 30. 1853.} far from being the case here. It was decided indeed unanimously by three Judges, Lord Medwyn being absent, but those Judges relied upon the *Jedburgh* case. Lord Murray does so expressly. Now the *Jedburgh* case was decided by the opinions of the Lord Justice-Clerk, Lord Cockburn, and Lord Moncreiff. But Lord Medwyn differed from his learned brethren, and he had agreeing with him the learned Lord Ordinary, Lord Dundrennan. Consequently the weight of authority below was divided in the nearly equal proportion of three to two. I need say nothing of the case of *Hume v. Halliday*, in which we have the benefit of Lord Jeffrey's opinion clearly expressed in favour of the view to which we now have come.

My Lords, the text writers up to a very late period seem to have had no doubt upon this subject. There is the late Mr William Bell, Mr Hutchinson, the late Professor Bell, and I think one or two others, probably living authors, and therefore I do not refer to them. They appear to have had no doubt whatever respecting derivative settlement being the law of the land, and I can see no difference whatever, any more than my noble and learned friend can, between derivative settlement as applied to a case where a parent has acquired it by industrial residence, and one in which he acquired it in any other way.

Roll, Q.C. With respect to costs, your Lordships are about to affirm the interlocutors of the Sheriff, which were appealed to the Court of Session. I apprehend the principle of the decision of the House will be, that your Lordships will make the order which the Court of Session ought to have made, and therefore give us the costs in the Court below.

Solicitor-General. The judgment which they did give was the one which they were bound to give in consequence of the *Jedburgh* case, till they had the light of the decision of this House.

Roll. Your Lordships see that it is not as though the law had been settled by a series of decisions.

LORD BROUGHAM. Still there was the *Jedburgh* case standing.

Roll. Our proceedings were commenced before the *Jedburgh* case, and the costs were incurred before the decision in it.

LORD BROUGHAM. At that date the decision in the *Jedburgh* case was a binding decision on the Court.

LORD CHANCELLOR. Their Lordships will give no costs.

Interlocutors reversed.

Henry Ward, Lincoln's Inn Fields, London,	} Agents for Appellant.
James Burness, S.S.C., Edinburgh,	
Deans & Rodgers, Westminster,	} Agents for the Respondent.
Patrick, M'Ewan, & Carment, W.S., Edinburgh,	

(J. B. K.)

EDINBURGH AND GLASGOW RAILWAY CO. v. STIRLING AND DUNFERMLINE RAILWAY CO. No. 16.

Statute—Lease—Railway Company.—The Act for making the Stirling and Dunfermline Railway provided that "the main railway and branch railways hereby authorised to be made, shall, on their completion, or on the completion of any part of them, be taken and

held in lease for the period of thirty-five years after such completion," by the Edinburgh and Glasgow Railway Company:—*Held*, that Edinburgh and Glasgow Railway Company was bound to take a portion, extending to nearly fourteen miles in length, on its completion, in terms of the statute, although the remainder of the main line was then not completed, and it was averred could not be completed; and, *Observed*, that the period of the duration of the lease was one period for the whole line and branches, and would commence to run from the date of the due completion of the first portion.

Statute.—*Held*, that a clause in a statute saving a prior statute, and an agreement upon which it had been founded, did not import into that statute, nor give validity to, a condition contained in the agreement, but omitted in the consequent statute.

July 8. 1853. The conclusions of this action and principal interlocutor appealed from will be found *ante*, vol. i. p. 619.

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By the original Stirling and Dunfermline Railway Act (1845), it was provided, § 19, "That the main line of the said railway shall commence at or near to the gas works in the burgh of Stirling, and also by a junction with the Scottish Central Railway near the new bridge at Stirling." Section 26 limited the powers of the company for the compulsory purchase of land to three years from the passing of the Act, and sect. 30 declared that the railway should be completed within seven years from the same date. Section 41 was in these terms: "The main railway and branch railways hereby authorised to be made shall be executed and completed under the superintendence and control, and to the satisfaction of John Miller, Esq., civil engineer in Edinburgh, whom failing, of the engineer for the time being of the Edinburgh and Glasgow Railway Co., and shall on their completion, or on the completion of any part thereof, be leased by the company hereby incorporated to and shall be taken and held in lease for the period of thirty-five years after such completion by the Edinburgh and Glasgow Railway Co., and shall during the said period vest in them, subject to the conditions herein contained." The subsequent clauses contained provisions relative to the upholding of the line, the regulation of tolls and rates, division of traffic, payment of a fixed rent of four per cent. on the expenditure, all by the Edinburgh and Glasgow Railway Co., and to take effect "from and after the completion of the said main railway and branch railways, or any part thereof," and "during the said period of thirty-five years."

The conditions of lease contained in this Act were in implement of an agreement entered into in July 1845 by the directors of the Edinburgh and Glasgow Railway with the provisional directors of the proposed Stirling and Dunfermline Railway, for "a lease of the said line of railway from Stirling to Dunfermline by Alloa, with the said branches to Alloa and Tillin-coultry, for the term of thirty-five years, to be computed from the time of the completion thereof, or for such other period as may hereafter be agreed upon between the parties hereto, upon the terms," &c., therein after specified. But it was declared that "in the event of the said Edinburgh and Glasgow Railway Co. failing to obtain before the completion of the Stirling and Dunfermline Railway such Act or Acts of Parliament, or other arrangements as will enable them to make a branch or branches from their said line of railway to connect the same, with or without the intervention of a ferry, with some point on the said line of railway from Stirling to Dunfermline, then and in that case these presents, and all that has followed or is competent to follow

thereon, shall in the option of either party hereto, become void and null to July 8. 1858. all intents and purposes, in the same manner as if this contract or agreement had never been entered into."

This condition of avoidance was not inserted in the consequent Act. But the Stirling and Dunfermline Railway Co. having subsequently brought in a bill for relieving them from the obligation to lease the line to the Edinburgh and Glasgow Railway Co. that Company opposed the passing of the bill, and its opposition was successful. In 1848 the Stirling and Dunfermline Railway Co. procured another Act, authorising certain deviations and alterations of the railway, sect. 17 of which was in these terms: "That nothing in this Act contained shall alter, prejudice, or affect, or in any way diminish the rights and privileges of the Edinburgh and Glasgow Railway Co. under a certain agreement for a lease dated 27th June 1845 and subsequent dates, in the said recited Act," i. e., the Act of 1846. In 1849 the company procured a third Act, authorising certain further deviations and alterations, and extending the time for completion of the railway to three years from its date. Section 2 of this Act provided that nothing therein contained should alter or affect the rights and interests of the Edinburgh and Glasgow Railway Company, and the Stirling and Dunfermline Railway Company, under the Act of 1846. Section 23 declared, that the junction with the Scottish Central Railway, authorised in the Act of 1846, should take place near the north end of the bridge over the Forth belonging to the latter company. Section 24 bound the Scottish Central Railway Co. to permit the use of their line from the point of junction to their station at Stirling, to the Dunfermline Railway Co., on payment of tolls, and bound them to afford sufficient accommodation at their station for the traffic of that company. Section 25 enacted, "That saving in so far as herein-before expressly provided, it shall not be lawful to the Stirling and Dunfermline Railway Co., or any other company or party, to enter upon, purchase, or take any lands belonging to the Scottish Railway Co., without the previous consent of such company, first had and obtained; nor to alter or vary the line or levels of the said Scottish Central Railway Co. without such consent, nor shall it be in the power of the said Stirling and Dunfermline Railway Co. to interfere with the said railway, except for the purpose of making and maintaining the junction before mentioned, in the manner herein provided, or in any way to interrupt or interfere with the traffic passing on the said last mentioned railway, anything in the said recited Acts to the contrary notwithstanding."

A portion of the line, betwixt Dunfermline and Alloa, extending to nearly fourteen miles, having been completed, and certified as fit for traffic, in terms of the Act of 1846, the company called on the Edinburgh and Glasgow Railway Co. to take it in lease. That company refused, and the present action was brought to compel them. It was averred by the Edinburgh and Glasgow Co. that the statutory period had expired without the Stirling and Dunfermline Company having served the notices upon the land-owners whose property would need to be taken to form the line into Stirling, and the station contemplated in the Act 1846. Parties were therefore ordered to lodge minutes, with a plan, shewing in how far they severally averred such notices to have been given, or not given, with respect to any such properties. The Stirling

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and Dunfermline Company stated in their minute that such notices had been duly given, prior to the expiry of the powers of the Act in 1849, as to all the lands required for the completion of the line according to that Act, and they lodged copies of the notices. The Edinburgh and Glasgow Company denied that the notices had been given, or, at all events, they averred that their validity was under dispute by the Scottish Central Company. No further proof was given on either side, and the judgment of the Court of Session was in favour of the pursuers, (*ante*, vol. i., p. 621). Against that interlocutor, and against a subsequent one of the Lord Ordinary, remitting to John Miller, C.E., to ascertain and fix the amount of expenditure incurred in completing the part of the railway from Dunfermline to Alloa, the Edinburgh and Glasgow Railway Co. brought the present appeal.

Sir Fitzroy Kelly, Q.C., and *Rolt*, Q.C., for the appellants. The judgment under review has proceeded on an unascertained state of the facts which are in dispute, and ought therefore to be quashed. As regards its findings the original Act of 1846 did not contemplate nor authorise the completion of the line piecemeal, and the handing it over bit by bit to the appellants. It provided only for one inspection by Mr Miller, and for one period of commencement of the lease. If this were to be taken as at the completion of the first portion, the appellants would not enjoy their full stipulated term of the whole. In sec. 41 of the Act of 1846 the true nominative of the verb "shall be leased," is "the main railways and branch railways," meaning the whole line when completed. The words as to completion of the railways or any part thereof, were only intended to give a power of taking possession of any part that might be finished, but could not be construed as making the lease of the whole line begin to run from the date of completion of a part. The line might never be completed. In the Exchequer Chamber recently (*R. v. York and North Midland Railway Co.*) it had been held that one of the public could not compel the completion of a railway. There might in this case be a question whether one of two contracting parties could. But in truth there were no contracting parties here to that effect. Further, that contract which was entered into under the Act 1846 could not now be carried into effect. A separate terminus was stipulated for, as well as a junction with the Scottish Central Railway, for effecting which they had now lost their powers. They had indeed been expressly renounced in sec. 25 of that Act, because the ground near the gas works on which the terminus was to be made had been acquired previously by the Scottish Central Co. There was also in the prior contract on which the Act was founded, a stipulation that either of the parties might throw up their engagements in the event of the Edinburgh and Glasgow Co. not securing an independent junction with the Stirling and Dunfermline line. That stipulation it was true had not been inserted in the Act, but as the Act had been obtained in virtue of the agreement, it must be held to incorporate all which the deed contained. The agreement was, moreover, expressly referred to as still binding by the subsequent Act of 1848. These two circumstances took this case out of the rule of *Tod v. North British Railway Co.*, and it was therefore in the option of the Edinburgh and Glasgow Co. to refuse to implement the agreement, of which more than one essential stipulation had become incapable of fulfilment.

The *Solicitor-General (Bethell)*, and *Dean of Faculty*, for the respondents. July 8. 1853.
 We rely on the plain reading of the words of section 41, Act 1846, that on the completion of any part of the line, the reciprocal obligations of the lease are to commence. The other sections are all consistent with this, and with no other view, and there is no difficulty in carrying them out in the statutory form as each successive portion is finished. That which is already finished is a portion of such length and importance as to leave no ground for speculation, as to what might have been argued, had only a mile or half a mile been in question. As to the point that the remainder of the line never may be completed, it does not arise save technically, for in point of fact, the whole line has now been completed and inspected by the government engineer. As to the stipulations in the agreement, *Tod v. North British Railway Co.*, 5 S. Bell Ap. Cases, 184, decided, and has been often since followed, that no agreement not expressly embodied or directly referred to in a statute will be permitted to explain or alter the statutory provisions. Those provisions have here been fully implemented by the Stirling and Dunfermline Company, for they duly served the notices necessary for acquiring the land for completing the line, and for a station, and the circumstance that part of the land belongs to the Scottish Central Company, does not invalidate these notices, because they were made under the Act 1846, and all powers contained in that Act are saved by the second section of the Act 1849. Then the twenty-fifth section, which is that relied on, contains in its outset a saving clause, which prevents it being applicable at all to the land in question.

The LORD CHANCELLOR. My Lords, this is a case which, in the view I take of it, lies in the very narrowest compass. The main question is as to the construction of the Act of 1846, and I must own that if I had been in the Court of Session, probably I should have taken a different view from what the learned Judges there took. The reason why I entertain that opinion is, because it seems to me perfectly clear that some violence must be done to the language of the Act, the language of the forty-first section of the Act. For, taking these words strictly, literally, would be clearly to involve the parties in that which would be absurd. It cannot be that on the completion of half a mile, the company were bound to take it and pay a very heavy rent for it. That was not what was contemplated by the legislature. The only question is, how with the least possible violence to the language, you are to interpret the words "or any part thereof?" The construction put upon it by the Court of Session is, that it means any reasonable part. I am very much inclined to adopt the same view, but then where I feel inclined to differ from the Court of Session is in this, that I do not think that the question of whether a particular part is a reasonable part is a question that the legislature meant to be solved by the Court. I think the true meaning is this, upon completion of the whole they are to take the lease, or if the parties think fit, on the completion of any part short of the whole. That was necessary because one railway can only lease to another in virtue of an express authority given to it by the legislature. If the legislature had said, you may lease the line from point A. to point B., grave doubts might have arisen whether, if they did not carry it quite up to B., it were competent to lease or to take in lease the portion made. Therefore interpret the words in this way, that on the comple-

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tion of the entire railway, or a reasonable part, the reasonableness to be determined by the parties themselves, then the lease was to take effect. I arrive at this conclusion on several grounds. I do not see what the Court has to guide it in saying whether any part is a reasonable part or not. That is to be the test? The Solicitor-General suggested that it must be a portion from station to station. That would involve the parties in endless difficulty. Then it was said, such a portion as they might work with profit. How is the Court to judge of that? Besides, it was pointed out by Sir F. Kelly, that though the line were completed from Stirling to Dunfermline, yet the Act provides that it shall not be worked till the branches are completed. Then again if they are to take only a part, I have never been told of any sufficient solution of the difficulty which is to happen if the whole line is not completed. I do not know how far it does or does not appear that they could complete it. Upon that I give no opinion, but if they are bound to take a part it was possible that the whole could not be completed. Then the Solicitor-General says that the legislature has not contemplated that. The legislature has contemplated it, and has provided for it. I confess I think the view I have taken may be borne out by the words in the preamble of the Act, beginning, "whereas the said railways might be beneficially worked in connection with the Edinburgh and Glasgow Railway, and the company to whom the last mentioned railway belongs are willing to take on lease and work the same if authorised by Parliament so to do," and the Stirling Company "are willing to lease the railways to such company." Now that being the object, the Act is passed, and the forty-first section carries it into effect by granting a lease of these railways, that is, of the "main line and branches," for thirty-five years. On these grounds, I should have come to a different conclusion from the learned Judges in the Court below—but I understand that is not the opinion of the majority of your Lordships. I have felt it my duty however to give my opinion, and having done that, I leave it to your Lordships to dispose of the case as you think fit.

LORD BROUGHAM. My Lords, in this case I entirely agree with my noble and learned friend on the woolsack, that the question lies in a very narrow compass, and that the construction of the words to which he has referred in the sections of the Act of 1846, is not overruled or altered at all by what is to be found in the Act of 1849. My Lords, I do not understand that my noble and learned friend, (although he says that had the question now come before him for the first time his opinion would have been different from that entertained by the Court below,) holds it so strongly that he would be now prepared, if it rested upon him, to reverse the judgment which was unanimous in the Court below, both of the learned Lord Ordinary, and of the four Judges to whom it went by advocacy, by appeal as it were. My Lords, I certainly agree with the Court below. I hold that they adopted the right construction of the forty-first section. I hold that that section enacts that the railways are to be taken after total completion, if it is a completion of the whole, or after the completion of a part, if it is a partial completion, for the period of thirty-five years after such completion, and are to be held in lease for that period from and after such completion of a part.

My Lords, it has been said, and was argued at the bar, that we must supply

something by intendment as to completion. I take it, however, that we may July 8. 1853. read the words "completion" and "complete" in the sense complete for working, fit for working, which would not only imply that the rails were laid down, but that it should be complete during a certain material part of its distance, I should say from station to station, without which, undoubtedly, it could not be said to be complete for working, and this would exclude the supposition that you are to go the extreme length of holding that the lease must begin when half a mile is completed. Then provision is made for the rent, and very properly 4 per cent. is made payable upon the expenses of getting the Act, because whether the whole line be, is, or is not to be enjoyed for that period of thirty-five years from the time of the total or partial completion, it is proper they should pay a portion of the expense of obtaining that Act, without which no part could be enjoyed by any body. But, then, the rest of the rent is to consist of 4 per cent. upon what? Upon the expenses of construction, which, of course, would be the construction of the part completed and enjoyed. My Lords, it is obvious.

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I do not enter further into the case. I have seen nothing to disapprove in the opinions and arguments given by the learned Judges in the Court below. I most entirely concur not only in the conclusion to which they have arrived, but in the grounds on which the conclusion is founded.

LORD ST LEONARDS. My Lords, it appears to me that the judgment of the Court below is in all respects right; and I should have felt a very confident opinion on that subject, if it had not been for the view which has been expressed by my noble and learned friend on the woolsack. The question arises under an Act of Parliament which has this peculiarity, that it not only declares that a lease is to be granted, but in effect it executes its own purpose, and has actually vested the property in the party who was to hold it for a certain term of years. Now, we have had a very elaborate argument to shew us that this Act never can have effect as to vesting the property, unless in one of two cases; that is, either that the whole of the projected railway shall be completed, or that the new company, the Stirling and Dunfermline Company, shall elect (for that is the way in which it was originally argued by the appellants) to execute only a portion of it, in which case the appellants admit that they are bound by the lease; but they say they are not bound to take a portion where it is intended to go on and complete the railway, and that the lease of it must be one term. Now that is very capricious. But only observe for a moment the relation between the two parties, and the whole difficulty appears to me to vanish. Had the new company not intervened to execute this line, what would have been the result? The Edinburgh and Glasgow line, who went with them to Parliament, would have gone alone, and would have executed the works of the railway in a manner to enable them, as all railway companies do, to work a certain portion when it was completed, not waiting till the completion of the whole, but taking care in the interim to run from a point to a point which should be productive of a profit, and so give them funds with which to go on. If, therefore, this had been the case, exactly the same thing would have taken place which will take place under the decision of the Judges below, the railway having been executed by one company, and being to be worked by another.

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But if, on the other hand, the appellants are right, let us see what an absurdity would have been the consequence. The thirteen miles are executed, and they say they are not bound to take them. But under the statute, having obtained Mr Miller's certificate, the respondents are freed from all further charge over that portion. Then, are these thirteen miles to be thrown open to the world and not to be protected? There never was an absurdity equal to this. Now in the reply, that section of the first Act was brought forward to which my noble and learned friend has alluded, namely, the provision that the main line shall not be open till the branches are ready to be opened at the same time. Why, look what the clear intention was. You shall not get one of these branches which are so much required, but you shall execute them as soon as you execute the whole of your main line and are ready to open it. But the Act does not say that you shall not open the branches till the main line is opened. And then your Lordships are asked to say what would have been the result, supposing this company had executed the works of the main line without executing the branches. There might have been no profit, but the old company might have been compelled to take it. But the branch railways were executed first, and were put into a state for working, and the main line was finished last. Now, as to the sections in the original Act which have been so much referred to, the result of them is, that when the main line and branches or a part of them is completed, the whole or the part completed vests in the old company for the term of thirty-five years. There can be no other construction. As regards the part, that must be open necessarily to the construction of a reasonable part. There was a little difficulty about the rent, but the Act expressly provides that the time of payment of the rent, and the arrangements with regard to it shall be in the discretion of the parties. But as regards the rest, it seems to me to be the simplest of all simple things. As soon as a proper portion was completed, it was to be taken by the old company, and the learned Judges below have put the proper construction upon the Act. The old company was sufficiently protected by the provision for inspection by Mr Miller, and when he had certified the completion of a part, that part at once vested in the old company, and the term then commenced. I see nothing in the elaborate argument which was made about the impossibility of the incompleted portions vesting. As the successive portions are completed they will vest in the company for that particular term, and I apprehend very clearly that the whole is one term, and that that term is to date from the period of the 4th December 1850, when Mr Miller made his certificate. The Court below has given no decision upon this point, but it has in one respect gone further, for it has imposed a condition on the respondents to go on and complete the railway. In that respect I think it has gone further than the case warranted—but that does not lie in the mouth of the appellants. And I do not think it was necessary for the Court below to enquire into what was exactly the state of things with regard to whether any part of the land necessary to complete the works had not been bought. The Act of 1846 was an Act between both parties. The Act of 1848 was obtained by one and submitted to by the other. According to my apprehension any term which was varied in that Act of 1848 was as binding upon the one party as on the other. The line was varied, and of course the lease was also varied

and made applicable to the varied line. And there was a saving introduced July 8. 1853. into that Act because at that time the new company wished to get rid of the lease, and the old company would not permit them. But the saving applies not only to the agreement but to the Act of 1846, and therefore that neutralises and explains the saving, and renders it altogether imperative as regards the parties now before your Lordships. Then comes the Act of 1849. Now that Act was strongly opposed by the old company; they had by this time changed their note, and insisted particularly that they ought to be released from their obligation. Parliament decided against them, and the very first provision of that Act is one saving the rights not of one company or the other, but of both companies, that is to say, the one shall have the power of making and the other the power of working the railway when made as altered by this Act, notwithstanding anything that may have taken place.

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My Lords, I might go farther into these Acts—but I am aware that other business is about to come on. But if I were to go through the Acts I could shew that every clause is consistent with the view I have taken, that in this view every word will receive effect in its natural construction, the real intention of the legislature and of the parties will receive effect, and the old company will not be permitted to evade their contract on refined arguments such as have been addressed to your Lordships; whilst on any other view you must cut down words of clear and strong import, and which admit of not the slightest doubt in their construction. There was one point which was a good deal pressed, with regard to the charge of interest upon the expenses of the Act of Parliament. That claim was made in the summons and was not resisted in the defences. After the interlocutor on the principal point in the Court below, the Lord Ordinary made a remit on that question. It has been appealed to this House, but I apprehend as a mere make-weight. It was not resisted in the Court below, nor appealed to the Inner House, and I therefore apprehend that it is a little too late to enter into that objection. The interlocutors complained of must therefore be affirmed, and as there were no good grounds for the appeal, with costs.

Rolt. Perhaps your Lordship will permit me to say as to costs, that in *Johnson v. Beattie*, this House laid down the rule that when there was a difference among your Lordships on the question of affirming an interlocutor, that interlocutor should not be affirmed with costs.

LORD CHANCELLOR. If we act upon anything of that sort I should require further time to consider. I thought it my duty to express the opinion which I entertained, but the fact of its being different from that of my noble and learned friends would certainly lead me to doubt whether my noble and learned friends may not be right.

Interlocutor “affirmed with costs.”

Richardson, Loch, & Maclaurin, Westminster,
Smith & Kinnear, W.S., Edinburgh,
Deans & Rogers, Westminster,
Dundas & Jamieson, W.S., Edinburgh,

} Agents for Appellants.
}
} Agents for Respondents.

(J. B. K.)

No. 17.

URQUHART v. URQUHART.

Tailzie.—The proprietor of an estate having made up his titles as heir of provision under a marriage contract, which contained a destination fenced with irritant and resolute clauses, but no prohibitions against alienation or contracting of debt,—*Held*, that a subsequent strict entail made by him was invalid, and might be reduced as *ultra vires*.

Homologation—Title.—*Held*, that an heir who has made up his titles under one investiture, and possessed on them for some years, is not barred from afterwards challenging that investiture, and recurring to a different title standing in his person.

Statute.—*Held* that the 48d section of the statute 11 and 12 Vict. c. 36 is not retrospective.

July 14. 1858. In 1753, by ante-nuptial contract of marriage, Keith Urquhart, with consent of his father, resigned and surrendered the lands and barony of Meldrum, in the county of Aberdeen, in favour and for new infestment to be granted to himself and the heirs-male to be procreate of the marriage, whom failing, to the heirs-male of any future marriage, whom failing, successively to the heirs-female of the marriage, to the heirs whatever of his body, and to his heirs of line, in the order contained in a deed of settlement made by his father in 1749, whom all failing, to his heirs and assignees whomsoever; but that with and under the conditions and restrictions contained in the contract of marriage, which were appointed to be inserted in all future charters, services, and infestments. These conditions were the exclusion of heirs-portioners, the assumption of name and arms of Urquhart, and a prohibition against alteration of the order of succession, "in so far as the same is conceived in favour of or may be extended to, or affect the descendants of the body of the said Keith Urquhart, or of the body of the foresaid William Urquhart his father, and specified herein or in the deed of settlement above mentioned, and charter and sasine following thereon." This prohibition was validly fenced with irritant and resolute clauses. But there were no such clauses, nor any prohibition, applicable to alienations or to the contraction of debt.

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On the death of Keith Urquhart, his son James, as heir-male of the marriage, expedé, and was infest on, a Crown charter of resignation dated February 1794, proceeding on the procurator of resignation contained in the marriage contract, and containing the provisions and conditions by it required to be inserted. In 1818 he expedé a new Crown charter on procuratories granted by himself in favour of himself and the other heirs of the former destination, and containing the same provisions and conditions. In 1825 he executed a strict deed of entail of the estate. The destination was the same as that contained in the previous investitures, but prohibitions were now added against alienations and contraction of debt, and these were duly fenced by irritant and resolute clauses, appointed to be inserted in all future investitures. The entail was duly recorded, the maker was infest on the precept of sasine contained in it, and further expedé a Crown charter of confirmation in 1826.

In 1823 he executed a last will and testament, by which he bequeathed his moveable property, subject to a liferent to his wife and the payment of certain legacies, to his cousin Beauchamp Colclough Urquhart, the respondent in the present appeal, as residuary legatee. The deed contained a declaration

of the wish of the testator that in the event of his wife surviving him she ^{July 14. 1858.} should enjoy the use of the mansion-house and grounds of Meldrum during her life at the rent of £80 sterling, and should have power to occupy as much ^{Urquhart v. Urquhart.} of the pasture or other ground in the vicinity of the house as she thought fit, on paying for it one half of the fair estimated rent; and it provided, that "if the said Beauchamp Colclough Urquhart and his foresaids, as heirs of entail, shall refuse or demur to acquiesce in and not at once give full effect to these my wishes for my said wife's comfort and convenience, then and in that case that he and his foresaids shall not receive or have any benefit whatever from the provisions conceived hereby in his or their favour." Mrs Urquhart however predeceased her husband.

In 1835 James Urquhart, the entailor and testator died, and Beauchamp Colclough Urquhart served heir of tailzie to him under the deed of 1825, and was infeft as such in 1836. But in 1847 he along with his eldest son raised an action of reduction of that deed, and of the whole titles made up under it, on the ground that it was *ultra vires* of James Urquhart, himself taking as a limited fiar under the marriage contract of 1753, to impose additional fetters on the future heirs under the destination therein contained. There was also a conclusion for declarator that the pursuer was entitled to make up titles to the estate without inserting in them any other conditions or provisions than those contained in the marriage contract. Defences were lodged for Beauchamp Colclough Urquhart junior, second son of B. C. Urquhart the pursuer. In the course of the action it appeared that certain superiorities of lands included under the marriage contract having been disposed by James Urquhart for the purpose of creating votes, had been reconveyed to him prior to the execution of the tailzie of 1825, and were included under that deed. By minute the pursuers restricted the conclusions of the action in so far as these lands were conceived to the *dominium utile*, but they abandoned all right and title to the superiorities, and therefore craved a reduction *in toto* of the deed of entail and consequent writs.

On 22d December 1848 the Lord Ordinary (Wood,) "reduced, declared, found, and decerned in terms of the conclusions of the libel as restricted by the said minute and now insisted in." On 20th Feb. 1851 the Inner House, (First Division), adhered. Against these interlocutors the present appeal was brought.

Rolt, Q.C., and *Kerr*, for the appellant. There are several preliminary and personal exceptions to the title of the pursuer in this action. He has already homologated the deed which he now seeks to reduce by making up his own titles under it, and by granting bonds as heir of entail, in terms of the statute 10 Geo. III., c. 51. He also made up titles under it to properties, which in any view, and by his own admission, were competently included under it. But having once elected to take up these, and with these the others which were conjoined with them in the deed now in question, it is out of his power to go back now and renounce that deed. Further, in the will of James Colclough there was an express recognition of the validity of the tailzie imposed upon the pursuer, and which, by taking under the will, he took upon himself. He was not to be entitled to the provisions in his favour there made,

July 14. 1858. except on condition of doing certain things as heir of tailzie. He accepted the provisions, and therefore came under the obligations and assumed the character in respect of which they were imposed, to renounce which none were to approbate and reprobate the will; *Breadalbane's Trustees*, 5th March 1840, 2 D. 731. Another and valid objection to the pleas of the pursuer was started by Lord Fullerton in the Court below, founded on the recent Entail Act, 11 and 12 Vict., c. 36, § 43. By this section it is declared, that when an entail is invalid as regards one fetter, "then and in that case such tailzie shall be deemed and taken from and after the passing of this Act to be invalid and ineffectual as regards all the prohibitions, and the estate shall be subject to the debts and deeds of the heir then in possession, and of his successors, as they shall thereafter in order take under such tailzie, and no action of forfeiture shall be competent at the instance of any heir-substitute in such tailzie against the heir in possession under the same, by reason of any contravention of all or any of the prohibitions." Under this enactment, the marriage contract of 1753, which was defective as a tailzie, in consequence of having no prohibitions against contracting debt or alienations, became utterly null as regards the prohibition against altering the order of the succession. James Urquhart, therefore, held under it as fee-simple proprietor, and as such was entitled to execute the entail of 1825 as if none before had ever existed. But even apart from this, and admitting the validity of the marriage contract as a destination, the power of James Urquhart to impose further fetters on the succeeding heirs was not interfered with. The cases cited on the other side were not in point, there being in each of them two points, only one of which, and that not arising in the present case, was decided in each. And the views of the appellant were strongly supported even in these cases by the observations of Lords Braxfield and Eskgrove in the *Culdares* case, and of Lords Balgray and Craigie in the *Fife* case. These Judges held themselves bound by the course of decisions—but that course of decisions, having reference in all the cases to an alteration in the substitution, does not apply to the present case, where no alteration was made in the substitution, but new fetters only were imposed upon the original substitutes.

Solicitor-General (Bethell) and *Anderson*, Q.C., for the respondents. There has been here nothing which can be held to infer homologation of the entail. It has been repeatedly held that a party who has made up his titles under one investiture may afterwards recur to another investiture, and reduce the first; *Munro*, 13th Feb. 1810, F. C.; *Lord Reay*, 2 S. D., 520, and 1 W. and S., Ap. Cases, 306; *Gardner*, 9 S. D., 138. The difficulty as to the superiorities was obviated by the minute renouncing them, and that raised under the provisions of the will never existed, as the predecease of the testator's widow rendered them inoperative. Even though she had survived, the pursuer might have taken under the will, and observed the conditions which it imposed, although at the same time he had raised a reduction of another deed, which it was *ultra vires* of the testator to grant. Upon the merits, it clearly appears that such was the character of the entail of 1825. The marriage contract was then a real, though an imperfect entail; and it is determined by the clearest course of decisions that under no circumstances can such a limited fiar, as the heir in possession then was, add new fetters to those contained in his own

titles; *Menzies of Culldares*, M. 15,436; *Meldrum*, 5 S. D., 796; *Earl of Fife*, 6 S. D., 698. As to the plea that the marriage contract was cut down by the late Entail Act, the enactment referred to is not retrospective in its terms, but on the contrary cuts down such entails as fall under it only from the date of the passing of the Act, and as regards the debts and deeds of the heir then in possession, or of any subsequent heir. It does not therefore cut it down so as to validate the deeds of any precedent heir. Still less could it impair the title of the present pursuers, whose action had been raised for more than a year prior to the passing of the Act.

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The LORD CHANCELLOR. My Lords, in this case, I have no difficulty in coming to the same opinion as the learned Judges of the Court below, whose judgment I think is perfectly right. The course of decision has been perfectly clear and uniform upon the point. There were at an early period doubts thrown out upon its soundness by Lord Braxfield and some others—and I confess that I was at first somewhat struck with the arguments which these learned Judges had used. But whatever be the soundness of them, they have not received corroboration from any subsequent decision. It was indeed argued that this house was not to be bound by that decision, the decision in the *Culdares* case, because it was said that although that case did come before this House, yet that this House did not expressly decide in it the particular point which arises here. But the course which this House took shews that it had formed an opinion upon that point, although it was not given in an express judgment. For the cause was remitted back to the Court below, in order that it might hear further argument on the question, whether the heir of entail was an institute or substitute; and it is therefore very clear this House substantially decided that if he were a substitute he could not exercise the powers which he attempted to exercise. Then there followed the cases of *Meldrum*, and of the *Earl of Fife*, in which the same principle was affirmed, and surprise was expressed that there could be the smallest doubt upon it. It has indeed been pressed upon us that there is a distinction betwixt this case and those, because here there was no attempt to alter the course of succession. It might be answered to that, that if you impose new fetters, and if they are followed by resolute clauses, so that the heir who breaks the conditions forfeits all right to the estate, and the next heir takes it as if he had been nearest heir to the preceding possessor, that does, in effect, change the order of succession. But I do not rest upon this argument as being at all material in this case, because the principle upon which the cases I have alluded to were decided seems to me clearly to embrace the present case, and to establish that no alteration of the entail whatever can be permitted. The entail is the law of enjoyment of that particular estate, and whoever takes the estate takes it subject to that law, and has no power to hold it except under that law. With respect to the argument which was used, to the effect, that Mr Urquhart had homologated the deed of 1825, I am clearly of opinion, that there is nothing in it. The case of *Gardner* and some others have decided that a proprietor may have recourse to a different title standing in his person from that on which he had first relied. Neither does the doctrine of election, of approbate and reprobate, come in question here, because Mr Urquhart has en-

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tirely renounced the deed on which he first made up his title, and has abandoned those small properties which were found to be included in it. Nor could the condition as to the jointure to his predecessor's wife, even if it had not become void by her death, compel him to abide at all hazards by the deed of 1825, to which it made reference. Then as to the point that was raised under the recent statute, I have no difficulty in coming to the same conclusion with the Court below. The only doubt that could be raised on reading the first part of the clause entirely disappears when the whole is read. The general principle is, that a statute is not to be made retrospective unless the words clearly compel you to give that effect. But here they not only do not do so, but are themselves irreconcilable with such an interpretation. I think the Court below has given a correct judgment on all the points in this case, and I accordingly move that your Lordships affirm it with costs.

LORD BROUGHAM. My Lords, I entirely concur. The rule is perfectly clear, and is not different in the Scottish law from what it is in the English, that taking an estate, limited by an entail, which, as my noble and learned friend has very well observed, is the law of enjoyment of the estate, you cannot alter the limitations of that entail in any way. If it is a defective entail, if it is bad, you may break through it, and if you choose, make another entail, but whilst it subsists you cannot alter or add to it. I agree with my noble and learned friend in all points.

LORD ST LEONARDS. My Lords, I am of the same opinion. Sitting as a Scottish Court, we are bound by Scottish rules, and I have seldom seen a clearer and more uninterrupted rule than this. The case has been fully argued for the appellants, but I have seldom seen a weaker.

Interlocutor "affirmed with costs."

<i>James Davidson, Westminster,</i>	}	Agents for Appellant.
<i>Ross & Auld, W.S., Edinburgh,</i>		
<i>Durnford & Co., Westminster,</i>	}	Agents for Respondent.
<i>James Ross, S.S.C., Edinburgh,</i>		

(J. B. K.)

No. 18.

MACDONALD v. LOCKHART.

Prescription—Title to Exclude.—Possession of a barony under Crown charters for more than forty years, held to confer a good title to exclude against a party claiming the superiority of certain lands lying within the barony.

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This appeal was the concluding act of a litigation commenced in 1814, and continued at intervals and in various actions to the present time. The case involved consideration of several voluminous progresses of titles, and a great variety of pleas in law, but only those points will be here stated which are necessary to explain the judgment ultimately pronounced.

Certain lands in many counties of Scotland, which had belonged to the Knights-Templars, became on the dissolution of that order the property of the Knights of St John. At the Reformation these were resigned by Sir James Sandilands, the last preceptor, to the Crown, and by it re-granted to him under the general designation of "all annual-rents, Temple lands, teinds," &c., "as well not named as named, being within the kingdom," which had belonged to said order, and were erected into one barony. They passed after a succession of conveyances into the hands of Lord Haddington, who in 1614 obtained a

charter of resignation, with a clause of novodamus, erecting anew all the Temple lands therein conveyed into one barony of Drem. Under various conveyances, the portion of this barony lying in the counties of Lanark and Aberdeen, came at length to be vested in Laurence Hill, writer in Glasgow. In 1814 Hill raised an action of non-entry against Sir Charles Macdonald Lockhart, in respect of certain lands of "Cumberland, Northflatt, Peacockland, and Clydesflatt, in the barony of Corington," possessed by him, and which Hill averred were Temple lands of which the superiority was vested in himself. An opinion adverse to this claim was intimated by the Court, but no judgment was given, Hill having abandoned the action. But Sir Charles, being desirous for political purposes of having a fee-simple title to these superiorities, his estate being entailed, entered into an arrangement with Hill for the purchase of any rights he might have in them, the price "if any," being to be fixed by an arbiter. Hill accordingly conveyed them to him, and he made up a separate title under the Crown to them, but the arbitration was never entered into, and beyond enrolment of his brother as a voter thereon, he never exercised any right of superiority in consequence. On his death his son Sir Norman Macdonald Lockhart succeeded him, and expedited a title to the entailed estate of the barony of Corington, but with an express exception of these superiorities. Sir Charles' fee-simple entail passed under his deed of settlement to his daughters. Against them in 1841, Hill raised an action for payment of £3000, as the price which he alleged was to have been paid by their father for the superiorities in question. By a subsequent arrangement with them, and in order to try the real question in dispute, he raised a declarator of non-entry in their names against Sir Norman Macdonald Lockhart. The Court (1st Division), in 1844, expressed an opinion against the pursuers—but delay of judgment was obtained on the averment that further documents in support of their case were to be produced, and the action was again abandoned. In 1845 Hill again raised an action of reduction-improbation and declarator of non-entry against Sir Norman Macdonald Lockhart, at the instance of Mrs Moreton the daughter, and of the other heirs of the late Sir Charles Macdonald Lockhart. Sir Norman on the other hand raised a counter action of reduction of the pursuer's own titles to the superiorities claimed, which action was conjoined with the principal one. The record being made up, full pleadings were given in for both parties, and the case having been reported to the Second Division, on 22d January 1850, an interlocutor was pronounced allowing a proof before answer to both parties of their respective averments, "considering that the defender, in support of the title to exclude produced by him, has averred that there is in the barony of Corington only one tenement or parcel of lands known by the name of the lands of Cummerland, which he and his predecessors have possessed as one tenement under that name in virtue of their infeftments under the Crown, and that there are no distinct lands in the said barony known by the separate names of Northflatt, Pakokland or Peacockland, and Clidesflatt, and that such lands, if any such there are, are only portions of the said lands of Cummerland, and have always been so known and possessed, and that the pursuers aver that there are distinct lands or tenements situated within the barony of Corington which are Temple lands, different from the lands of Cummerland, held by the defender Sir Nor-

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Aug. 15. 1853. man Macdonald Lockhart directly under the Crown, and to which their declarator of non-entry applies." A proof was accordingly led, and thereafter the Court by interlocutors of 6th December 1850, and 19th February 1851, found substantially in terms of the defender's averments, and accordingly sustained the title to exclude. In the action at the instance of Sir Norman Lockhart, in respect that the reductory conclusions were not now insisted in, they assolizied the defenders. And they found Sir Norman entitled to all the expenses incurred in reference to his title to exclude, but not to those incurred under the record as closed on the merits. Against these interlocutors Mrs Moreton brought the present appeal, and Sir Norman brought a cross appeal against those portions of the last which dismissed his action, and found him not entitled to full expenses.

This title to exclude, so sustained, consisted of a series of Crown charters, and infeftments thereon, "*totas et integris terris et baroniâ de Coringtoun comprehenden. terras postea spect. vizt. terras et terras dominicales de Coringtoun cum turre fortalicio,*" &c., &c.; "*terras de Burnbrae terras de Hillhead et terras de Cumberland,*" &c., &c. These carried the title back to 1722, at which date the deed of entail on which they proceeded was executed by the ancestor of the Lockharts. By him the lands had been purchased at a judicial sale in 1694, as the *hereditas jacens* of Sir William Lindsay, a Crown vassal in the barony of Corington. But it was averred by the pursuers that this same Sir William Lindsay was also proprietor of the *dominium utile* of the Temple lands of which they claimed the superiority, and held them under a charter from the then superior of the Temple lands, the Earl of Haddington, and that he had by a conveyance in his own lifetime conveyed that *dominium utile* to the ancestors of the Lockharts. But no infeftment having been taken by the Lockharts in them, they had remained ever since in non-entry.

It was in the opinion of the Judges of the First Division of the Court of Session in 1844, sufficiently established by the writs produced, that there had been prior to 1643, two separate properties comprehended locally within the barony of Corington; one, the barony proper, held of the Crown, and the other the Temple lands of Cumberland, &c., held of the Temple superiors. But they held, as the Second Division did afterwards on more complete inquiry, that these Temple lands had now become undistinguishable from the rest of the barony, and that, in whatever way acquired originally by the present owners of that barony, they had been since 1722 included under the general description of the barony, and as such had been held under its charters from the Crown.

It is therefore unnecessary to enumerate the progress of the pursuer's title—the objections that were taken to it—as ultimately nothing turned upon it. The pleas urged on that part of the case which came to be decided, were as follows:—

The *Dean of Faculty*, and *Anderson, Q. C.*, for appellants. Rights of superiority cannot be lost by mere lapse of time; Erskine, iii. 7, 12; Fergusson, 4 Jurist, 431; Hill, 11 S. 950; Forbes, 1 W. and S. app. cases, 657. Prescription, which thus cannot run against a superior, cannot run in any case except when founded on a sufficient title, Act 1617, c. 12. Here there was no title to the superiority in question ever conveyed to the respondent's

authors, and he cannot therefore defend himself by any period of time elapsed. Aug. 15. 1853.
 These lands were part of another barony, that of Drem, and though described as "lying in the barony of Corington" that was merely their local designation, and gave the owners of Corington no right over them. The ancient writs produced shew that they were always held of distinct superiors from the barony of Corington, and the words by which that barony was then described were precisely the same as those which are used now. Neither will general words bring a property to which a distinct title exists under an entail, King, 6 D., 821. In any case, as the existence of these separate superiorities was acknowledged by Sir Charles Macdonald Lockhart, who purchased them, and confirmed by his son Sir Norman, who excepted them expressly from his title to the entailed estate, he is precluded from now challenging them.

Solicitor-General, (Bethell,) and Gordon, for the respondents. There appears from the writs produced, although no direct conveyance can now be found, to be a strong presumption that the Earl of Haddington had conveyed the superiorities in question to Sir William Lindsay. If so, they passed by his general conveyance to Sir George Lockhart. It was undoubtedly the understanding that the whole property possessed by Sir W. Lindsay passed by his sale. But in any case, the titles of the respondent to the barony of Corington are broad enough to include the lands in question, and, if so, the Crown charters support prescription as to them as well as the others; Erskine, ii. 6, 18; Leven. Dict., 10,816; Dalrymple, 3 D., 837. Even supposing there had been formerly another title, the possession now must be attributed to the Crown charters; Robertson Hume, 463; Bruce, Dict., 10,805; Walker, 5 S., 409; Wilson, 2 D., 159; Elibank, 12 S., 98. The nominal purchase of the superiorities by Sir C. Lockhart could not prejudice his successors in the entail, and the exception in Sir Norman's titles only left that portion of his property as yet in non-entry under the Crown. As to the cross appeal, the first part of it was necessary to keep open the right to discuss the appellant's own title. The second part was against the finding as to expenses, by which the respondent, (defender,) had been compelled to bear the expense of a defence which he only stated in compliance with the stat. 6 Geo. IV., c. 120, § 5, and relative Act of Sederunt of 11th July 1828, § 36. The record was made up under the sanction of the Court on both defences, and the case was all along debated on both. This being the proper course, full expenses ought to be allowed.

The LORD CHANCELLOR, after stating the steps of the procedure in the case as before narrated, and the title set forth by the pursuer, proceeded. Now, my Lords, against this title founded on by the appellants in the present action, various objections have been stated by the respondent, but it is not necessary in the view which I have taken of the case to decide those points, and the appellant's title to the superiorities which they claim may be assumed to be good, provided they can shew that these superiorities form part of the barony of Drem, to which that title refers. Now, to shew this, they shewed that these superiorities were in the hands of the family of Lindsay till the year 1646. This fact they seek to establish by a reference to various retours and inquests prior to that date, and they rely on these, beginning with the inquest

Aug. 15. 1853. of 1466, as shewing that the lands of Cumberlând, Northflatt, Peacocklând, and Clydesflatt were held not of the Crown, but of the Knights of St John. These lands, they say, are described as the Temple lands of Corington, and were always held by the Lindsays down to 1643 under the Temple superiors, whilst the proper barony of Corington was held directly of the Crown. They further support their argument by a reference to the *valent* clauses in these old charters, which they say are the same for what was then called the barony of Corington, distinguished from the Temple lands as it is now in the charters of the appellant for his lands of Corington. Then the appellants maintain, that since 1646 no title has ever been made up to those Temple lands, and that as vested in the superiority as before detailed, they are entitled to call on the respondent as the heir of the party who was last infeft to make up his title to those properties under them.

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The respondent's title to the barony of Corington proceeds regularly from William Lindsay, who was infeft in it in 1666. They were purchased from his son and apparent heir at a judicial sale in 1694, by George Lockhart of Carnwath. Before completing his title, this George Lockhart in 1722 executed the entail of the lands under which they have been held since by the appellant's ancestors and himself. The entail contained an assignation to the decree of sale, in virtue of which the Crown charter was issued, and the title of all the successors under the entail has been made up under the Crown ever since, and having been thus possessed for a period far beyond that of prescription, the respondent maintains that his title cannot now be impeached. But then the appellants say, that this entail does not comprehend the lands of which they claim the superiorities, and that, although undoubtedly the respondent and his ancestors have, during all that time, been in enjoyment of these lands, that not having a proper title to them originally they cannot take the benefit of prescription to confirm their right. Now, undoubtedly, the appellants are quite right in the general proposition which they maintain, that no lapse of time during which a party has possessed lands without acknowledging a superior, will enable him to acquire the rights of that superior to himself, or to get rid of his obligation to acknowledge him whenever he shall be called upon. But that is not the question of law which arises here, for the question is, whether the respondents are in the situation of having made up no title to the lands under their proper superiors; and having made up a title to certain lands which were undoubtedly held of the Crown, whether the lands which are now in dispute are not properly included within that title. It is quite clear, that if these lands had been expressly by name included in the deed of entail, the Crown charter following upon that deed would have given a good title on which to found prescription. But is the case different if they are not expressly named? I think it is not. The question then comes to be, whether the lands are included in the general description. This always appears from the writs, if the writs are accurate and minute; but if they are not, then recourse must be had to the ground itself, and the lands must be identified with the description by personal examination and the testimony of witnesses. Now in this entail the words are very distinct. They comprehend all the lands contained in the barony of Corington, but no others. If the Lindsays had any other lands not included in the barony, they were not con-

veyed to George Lockhart. But I think it clearly appears that there were none. For undoubtedly George Lockhart and his successors have enjoyed all the lands which belonged to the Lindsays, and they have done great wrong to the Lindsays if any of these were not included in their conveyance. It is hardly possible to suppose that they were not. I am clearly of opinion, that since the judicial sale, all the lands have been held as included in the sale, and, as such, have been possessed under Crown charters during that period. This being the case, prescription has now rendered the title unchallengeable, and the respondent has consequently a good title to exclude in the present action. This must not be understood as in any way going against the doctrine that the right of a superior cannot be lost by lapse of time. On this question the law laid down by Erskine is perfectly sound. In this case, if the respondent had no title but one under Sir William Lindsay, he could not have prescribed upon it. But he has a different title, one derived directly from the Crown, and on that he is clearly entitled to prescribe against all the world. I must advert to the pursuer's argument that Sir Norman Macdonald Lockhart could not in this case plead a title to exclude, in consequence of the exception made by him in making up his own titles of the superiorities in question. At the most this would only cause these parts of the property to be still in non-entry, and it neither was intended to, nor could have the effect, of renouncing Sir Norman's right to these as part of his estate. On these grounds, I am prepared to concur entirely in the interlocutor of the Court below, which disposed of the merits of the case. One of the other interlocutors appealed against is that which allowed a proof before answer to the parties. I do not think that this practice, which is very common in Scotland, of allowing a proof before answer, is at all a good one. I think that it almost always leads to delay and expense. And I am by no means of opinion that this proof, though it might to a certain extent have aided the appellant's case, could, even if it had established that these were the lands which they averred, have rendered the result of the case different. But it was not objected to by either of the parties at the time, and was not contrary to the common custom, and I am therefore not now disposed to pronounce any order interfering with its results. The decrees will therefore in all respects be affirmed. As to the cross appeal it has been presented on two grounds. The first is, that the appellants in it, respondents in the principal appeal, not having found it necessary under the judgment of the Court, to proceed with one part of their case, yet declined to abandon it, lest if this House should reverse the judgment below on the other points, they might be precluded from bringing this under the review of the House. On that head, I think the cross appeal was properly brought. But the other ground is, that the Court did not give the respondent expenses on that part of his case, which thus proved to be unnecessary. But his position simply is, that having relied on two defences, one has been held sufficient and the other has been repelled. Therefore, I think that the Court did right in not allowing him the costs of that defence which was not sustained. On the whole, I think the interlocutors perfectly right, and shall propose that the first appeal be dismissed with costs, and the cross appeal dismissed also, but without costs.

Aug. 15. 1853. "Interlocutors affirmed, and first appeal dismissed with costs, cross appeal dismissed without costs."

Macdonald v.
Lockhart.

John Whitehead, S.S.C., Edinburgh,

Dodds and Greig, Westminster,

Cunningham and Bells, W.S., Edinburgh,

Richardson, Loch, and Maclaurin, Westminster,

} Agents for Appellant.

} Agents for Respondent.

(J. B. K.)

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- BURGH.** A petition and complaint to have an election of magistrates set aside was boxed on 12th November, being three days within the statutory two months, but did not appear in the single bills till the 16th, being one day after the expiry of that period; two box-days had intervened between the election and the lodging of the petition:—*Held*, the petition was presented too late, under 16 Geo. II., c. 11, § 24. *Kidd v. Young*, 12th February 1853, . 216
- A burgh corporation cannot be made notour bankrupt. *Borrow v. Musselburgh Magistrates*, 15th February 1853, . 236
- An election of magistrates and councillors was reduced on the ground of irregularities. Before these proceedings were terminated, the time for another annual election had come, and it was proceeded with. Against this election, as illegal, petition and complaint was, after lapse of two months, presented, and answers lodged thereto. During the dependence of this case application was made for interim managers, on the ground that the reduction of the first election had disfranchised the burgh:—*Held*, that it was not necessary that the second election should be challenged within the two months; that a reduction of it was not necessary; and that the petition and complaint was a sufficient challenge, and the application for interim managers regular and proper. *Kidd*, 11th March 1853, . 303
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- Terms of cautionary obligation, and circumstances in which *held*, that a cautioner was not liable to the creditor for the expenses of discussing the principal debtor. *Fenton v. Grant*, 1st March 1853, . 263
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— Where an action is brought against several defenders, concluding against them conjunctly for expenses, decree in absence against any one of them entitles the pursuer to decree for the full amount of the taxed expenses against such defender, and not merely for a proportional share of the expenses incurred down to the date of enrolment for decree. Mackenzie v. Cameron, 24th November 1852,	40
— In a cause where there were two defenders, one cited as principal debtor and the other as cautioner, and where the action was of consent sisted against the latter, on the case being sent to a jury, the pursuer, who obtained decree against both defenders jointly and severally on the merits, found entitled to expenses <i>generally</i> against the principal, and against the cautioner only in so far as occasioned by his appearance and pleading in the cause. Logan v. Gibson and Kennedy, 25th November 1852,	51
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— In a case in which the defenders were very numerous and were successful on the merits, full expenses allowed to each, in respect that their grounds of defence were necessarily various, so that they could not have had the same counsel and agents in common. Campbell v. Pringle, 22d January 1853,	158
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— Form of, disallowed, because they bore “fir-wood,” while the summons related to “hard-wood” only. <i>Bartholomews v. Gardner</i> , 23d Feb. 1853,	244
— In an issue which put the question, whether the public had for more than forty years used a certain read?— <i>Held</i> , that the party claiming the right for the public, and offering to prove prescriptive use, ought to be pursuer, though he was defender in the action. <i>Bates & Baring v. M’Queen</i> , 1st March 1853,	265
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— In action of damages brought on the ground that a charge of forgery against the pursuer had been lodged by defender with the procurator-fiscal, maliciously and without probable cause, and had been calumniously circulated throughout the country:— <i>Held</i> , that the words <i>maliciously and without probable cause</i> must be inserted in the issue relative to the information lodged with the fiscal; but not in any of the other issues relative to the other occasions in which it was said the charge was repeated. <i>Holehouse v. Walker</i> , 21st May 1853,	393
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— However the law may stand as to cases of <i>slander</i> , it is incompetent for pursuer in actions of damages for <i>malicious prosecution</i> , to convert an unprivileged into a privileged issue at the trial, by leading evidence of malice and want of probable cause, these qualities being omitted in the issue. <i>Graham v. M’Lachlan</i> , 2d July 1853,	496
— In action of damages against the proprietors of a stage-coach for injuries from an upset, pursuer libelled on various grounds, each sufficient to infer liability. <i>Form of issue approved of</i> for trial of such cases. <i>Black v. Croall</i> , 13th July 1853,	557
— In action of damages for slander, <i>form of issue</i> in justification which was <i>allowed</i> in the special circumstances of the case to be admitted to proof, in the event of a prior issue in justification being proved; though apparently it did not meet precisely the matter put in issue by pursuer. <i>Balfour v. Wallace</i> , 13th July 1853,	557
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— A bill was indorsed by the payee "to the agent of the North of Scotland Banking Co. at Macduff, or order," and by this indorsee "to the manager, North of Scotland Banking Co., Aberdeen, or order, (Signed) Robert Adam, agent :"— <i>Held</i> that these indorsements, as requiring extraneous evidence to explain them, did not render summary diligence on the bill competent, and a charge, therefore, <i>simpliciter</i> suspended. <i>Fraser v. Bannerman</i> , 22d June 1858,	464
SUPERIOR and vassal— <i>Non-entry</i> . In the feu-contracts of certain lands, dated in the middle of the seventeenth century, the entry of "assignees" was taxed at a certain sum. In action to compel the defender, a singular successor of the vassal last infeft, to pay a year's rent for his entry :— <i>Held</i> , that according to a fair construction of the particular terms of the original feu-contracts, the term <i>assignees</i> meant <i>singular successors</i> , and not merely assignees to an open precept; and, therefore, that defender was entitled to enter on paying only the taxed amounts. <i>Hamilton v. Dunn</i> , 16th July 1853,	568
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SUSPENSION, and SUSPENSION AND INTERDICT. A note of suspension and interdict was brought as supplementary to a previous note which had been passed, but to which the respondents had stated an objection, which it was intended by the supplementary note to remove. To this supplementary note an objection was taken of <i>his alibi pendens</i> . The complainers lodged a minute offering to abandon the previous note and pay expenses, but on condition that the supplementary note should be passed in order to try the question :— <i>Held</i> , that such abandonment although conditional, obviated the objection. <i>Taylor v. Glasgow, Paisley, and Ardrossan Canal Company</i> , 16th Nov. 1852,	8
— Where a disentail of certain lands had been effected, and the proprietor was, after the lapse of two years, about to expose them to sale, the Court refused a note of suspension and interdict, presented without caution, by a party claiming to be an heir-substitute, and one of the three next heirs. <i>Primrose v. Primrose</i> , 20th Nov. 1852,	22
— The Lord Ordinary having refused a note of suspension on the ground of delay in taking the charger's oath, which had been referred to :— <i>Held</i> , that a reclaiming note was a competent mode of proceeding on the part of the suspender, and that a new note of suspension was unnecessary. <i>Law v. Thomson</i> , 20th Nov. 1852,	28
— Of a charge on a bill <i>refused</i> which proceeded on an alleged discrepancy between the address to the acceptors by the drawer and their signature in accepting the bill. <i>Johnston v. Cliftonhill Coal Co.</i> , 24th Nov. 1852,	42
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— Where a note of suspension had been passed on juratory caution, and afterwards a certificate of no caution had been issued after an extended period for granting it, the complainer presented a note to the Lord Ordinary on the Bills, explaining why caution had not been found, and praying to have it now received. The Lord Ordinary refused this note as incompetent. The complainer having reclaimed, <i>held</i> that such a reclaiming note, if not quite incompetent, could only be received in most special circumstances. <i>Andrew v. Colquhoun</i> , 3d March 1853,	287
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— A will was executed in Jamaica creating a trust for educational purposes in Scotland, and appointing as trustees certain parties resident in Scotland, "their heirs and assignees":— <i>Held</i> , that the law of Scotland regulated the interpretation of "heirs and assignees," in a question whether these terms applied to all the trustees or only to the last survivor. <i>Ferguson v. Marjoribanks</i> , 1st April 1853,	365
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— A truster directed his estate to be divided among certain parties, one share to be lent out, and "the interest to be paid to my nephews and nieces during their lifetimes, and at their respective deaths, the capital share to be paid to their children:— <i>Held</i> the vesting of the fee in the children of a niece was not suspended by the subsistence of the trust till payment of the capital. <i>Halbert v. Dickson</i> , 28th March 1853,	346

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— Where aged and infirm witnesses have been examined on commission, before the adjusting of issues, they must be re-examined in written interrogatories after adjustment of issues. Morgan v. Morris, 1st April 1853,	380
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of Session, for divorce <i>a vinculo matrimonii</i> , founded on the same acts of adultery, the husband pleaded in bar of the action the English sentence of divorce:— <i>Held</i> , that the wife had not, by obtaining the divorce in England, lost her right of action in Scotland for a divorce <i>a vinculo matrimonii</i> . <i>Geills v. Geills</i> , 30th Nov. 1852,	Page 18
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— Terms of a later deed of contract of marriage, which was <i>held</i> to supersede a deed of tailzie duly recorded, but never feudalized, to the effect of making the investiture flow from the later deed. <i>Inglis v. Inglis</i> , 10th May 1853,	18
— The proprietor of an estate having made up his titles as heir of provision under a marriage contract, which contained a destination fenced with irritant and resolutive clauses, but no prohibitions against alienation or contracting of debt:— <i>Held</i> , that a subsequent strict entail made by him was invalid, and might be reduced as <i>ultra vires</i> . <i>Urquhart v. Urquhart</i> , 14th July 1853,	100
— <i>Amendment Act</i> . <i>Held</i> that the 43d section of the statute 11 and 12 Vict., c. 36, is not retrospective. <i>Urquhart v. Urquhart</i> , 14th July 1853,	100
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GROUND-ANNUAL. The obligation to pay a ground-annual is a personal one, of which the person who originally became bound to pay it cannot divest himself by the transference of the lands, without the consent of the party to whom it is payable. <i>Miller v. Small</i> , 17th March 1853,	60
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HERITABLE OR MOVEABLE. A testator conveyed his heritable subjects to trustees, to hold them till the eldest of his grandchildren, if any, should reach the age of 21; or, in case of no grandchildren, for 19 years from the date of the deed, in order that the same might be then sold and divided among his children. On his death, the beneficiaries, to pay his debts, entered into an agreement that a portion of the property should be sold immediately, and that the rents of the remainder, until sale, should be divided among the beneficiaries, in terms of the trust-deed, with power to sell if necessary, and a clause that the same, if not sold within the 19 years, should be sold whether there were grandchildren of the trustor or not. One of the beneficiaries who was a party to this agreement died before all the property was sold:— <i>Held</i> that his share of the trust-estate was moveable, but as there was no absolute conversion of a portion of the property till after the 19 years had elapsed, the rents, in respect of such, went to his heir-at-law. <i>Ferrie v. Ferrie</i> , 26th November 1852,	7
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HOMOLOGATION. <i>Held</i> , that an heir who has made up his titles under one investiture, and possessed on them for some years, is not barred from afterwards challenging that investiture, and recurring to a different title standing in his person. <i>Urquhart v. Urquhart</i> , 14th July 1853,	100
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INSURANCE, Marine. The <i>Laurel</i> , valued at L.7500, was insured from Quebec to a port in this kingdom, both on the ship and on the freight. On the voyage she was much damaged by an iceberg, but owing to her cargo being timber she was kept afloat till she neared Liverpool, when the dockmaster refused to admit her into dock owing to her disabled state, but ordered her to lie outside to be scuttled when the tide went out. In this position she grounded and fell outwards, thus sustaining much additional damage. With great labour she was afterwards floated into dock, her cargo delivered in safety, and the freight paid to the owners. On examination she was then pronounced a mere wreck, worth only L.475; and the owners (three weeks after the second accident) intimated to the underwriters on the ship an abandonment and a claim as for a total loss. Payment being refused, an action was brought, and the jury found that the vessel was a total wreck at the date of the second accident, and was rightly abandoned. The underwriters on the ship thus became entitled to the freight, which was paid to them by the owners, who then sued the underwriters on the freight as for a total loss of freight:— <i>Held</i> that no action lay, inasmuch as the freight insured was actually earned and received by the owners, who, but for their own act in abandoning the ship after such earning and receipt, might have retained the freight for their own use, and that, therefore, the contract of the pursuers of freight had been strictly performed. <i>Scottish Marine Insurance Company v. Turner</i> , 3d March 1853,	46
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PROCESS—Advocation. Case where pursuer <i>held</i> entitled to advocate, his objection being to <i>competency</i> , under 50 Geo. III., c. 112, § 26, but having failed to advocate at the time,— <i>held</i> , that he could not state his objection in any advocacy at a subsequent stage of the cause. <i>Wishart v. Wylie</i> , 14th April 1853, . . .	68
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— <i>Issue.</i> An issue cannot be taken for determining the existence of a servitude of way unless the pleadings have specifically set forth the claim to such servitude, and not merely averred the common use of the way by the parties claiming it. <i>Campbell v. Lang</i> , 6th May 1853, . . .	76
— <i>Summary Petition.</i> In a process commenced by petition— <i>held</i> , that the defender is entitled to call parties against whom, if himself found liable, he has a claim of relief, by petition also; and that the two actions may thereupon be properly conjoined. <i>Wishart v. Wylie</i> , 14th April 1853, . . .	68
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— <i>construction of</i> . A private statute will not be construed so as to cut off by implication rights belonging to the public, unless such construction be unsuitable. <i>Campbell v. Lang</i> , 6th May 1853,	76
— <i>Held</i> , that a clause in a statute, saving a prior statute and an agreement upon which it had been founded, did not import into the statute, nor give validity to, a condition contained in the agreement but omitted in the prior statute. <i>Edinburgh and Glasgow Railway Co. v. Stirling and Dunfermline Railway Co.</i> , 8th July 1853,	91
— The Act for making the Stirling and Dunfermline Railway provided that "the main railway and branch railways hereby authorised to be made, shall, on their completion, or on the completion of any part of them, be taken and held in lease for the period of thirty-five years after such completion," by the Edinburgh and Glasgow Railway Co.:— <i>Held</i> , that the latter company was bound to take a portion, fourteen miles long, on its completion, though the remainder of the main line was not then completed, and it was averred never could be completed: and <i>observed</i> , that the period of the duration of the lease was one period for the whole line and the branches; and would commence to run from the date of the due completion of the first portion. <i>Edinburgh and Glasgow Railway Co. v. Stirling and Dunfermline Railway Co.</i> , 8th July 1853,	91
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— 9 Geo. IV., c. 29, § 19. The prayer of a criminal complaint in a summary proceeding before the Sheriff under this Act, being for imprisonment only:— <i>Held</i> that Sheriff could not competently under it pronounce fine. <i>Question</i> , whether this prayer was strictly in accordance with the Act, seeing it did not pray alternatively for a fine "or for imprisonment," but only for the latter. Hood v. Young, 10th June 1853,	453
— 9 Geo. IV., c. 29, § 19. It is competent for the Sheriff without a jury to convict summarily under this Act for falsehood, fraud, and wilful imposition. Hood v. Young, 10th June 1853,	453
— 2 and 8 Will. IV., c. 68, § 11. The warrant to cite parties charged with contravention of this Act must bear to proceed on the oath of a credible witness. Blythe and Taylor v. Robson, 10th June 1853,	453
— 4 Geo. IV., c. 34, § 3. The latter part of this clause comprehends the case of a workman who deserts a service, which he has entered upon in terms not only of a verbal but of a written engagement <i>signed only by himself</i> . Argo v. Smarts, 16th June 1853,	458
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